MAY 12 1992
OFFICE OF THE CLERK

No. 91-6646

In The

Supreme Court of the United States

October Term, 1991

VERL HADLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF PETITIONER

JOHN TREBON
(Appointed by this Court)
LAW OFFICE OF JOHN TREBON, P.C.
Security Pacific Bank Building
121 E. Birch Avenue, Suite 207
Flagstaff, Arizona 86001
(602) 779-1713

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. If "intent" is not a genuine or disputed issue at trial, should the government be allowed to admit overwhelming amounts of uncharged misconduct evidence under the ruse of proving a technical issue of "intent" required by federal statute?

2. Should a trial court consider the defendant's offer to stipulate or enter into a judicial admission on the issue of "intent" as one factor in the balancing process required under Rule 403 of the Federal Rules of Evidence?

3. Is it appropriate for federal Courts to adopt a *per se* rule of admissibility in favor of prior bad acts whenever a "specific intent" crime is charged notwithstanding the provisions of Rule 403?

4. Did the trial court and the Court of Appeals correctly apply Rule 403 in Mr. Hadley's case relating to the admission of prior bad acts?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of Case 2

A. Statement of Facts and District Court Proceedings 3

B. Testimony of Verl Hadley and the Government's Continued Character Assassination ... 15

C. Additional Prior Bad Acts – Dating Back Seventeen Years 16

D. Court of Appeals Proceedings 17

Summary of Argument 18

Arguments 20

A. Excessive Prior Bad Act Evidence In This Case Was Not Only Irrelevant, But Highly Prejudicial. The Excesses Of The Government and Trial Court Blatantly Denied Mr. Hadley Of A Fair Trial 20

1. The Federal Rules of Evidence – The Key is Balancing Prabative Value Against Prejudice. The Key Was Thrown Away in Mr. Hadley's Case 20

TABLE OF CONTENTS – Continued

Page

2. "Intent" was only a Technical Issue – A Red Herring. "Intent" Could be Inferred from the Nature of the Act Alone 26

3. The Statutory Element of "Intent" was not a Contested Issue. The Prior Bad Acts Were Unnecessary 29

4. The Prior Bad Acts Were Prematurely Allowed During the Government's Case-In-Chief. The Weighing Process of Rule 403 Was Not Utilized 34

5. The Prejudice was Overwhelming, While the Probative Value was Slight 35

6. The Use of a Limiting Instruction Did Not Eliminate the Prejudice 40

B. The Offer To Concede or Stipulate To The Issue Of Intent Should Be A Relevant Factor To Consider Under Rule 403. The Ninth Circuit Emasculated The Balancing Approach Of Rule 403 By Refusing To Even Consider The Proposed Stipulation Or Judicial Admission 42

Conclusion 50

Appendix 1a

TABLE OF AUTHORITIES

Page

CASES:

Albrecht v. Broughton, 85 Cal. Rptr. 659 (Cal. App. 1 Dist. 1970) 49

Bruton v. United States, 391 U.S. 123 (1968) 41

City of Cleveland v. Cleveland Elec., etc., 538 F. Supp. 1257 (N. D. Ohio, 1980) 48

Clark v. State, 693 S.W. 2d 35 (Tex. App. 1985) 36

Coler v. State, 418 S. 2d 238 (Fla. 1982) 28

Crimm v. Missouri Pacific R. Co., 750 F. 2d 703 (7th Cir. 1984) 39

Estelle v. McGuire, 502 U.S. ___, 116 L. Ed. 2d 385 (1991) 26

Getz v. State, 538 A.2d 726 (Del.Super.1988) 32

Government of the Virgin Islands v. Toto, 529 F. 2d 278 (3rd Cir. 1976) 32, 35

Hall v. United States, 150 U.S. 1003 (1893) 41

Huddleston v. United States, 485 U.S. 681 (1988) 26

Krulewitch v. United States, 336 U.S. 440 (1949) 40

Landrum v. United States, 559 A. 2d 1323 (D.C. App. 1989) 31, 32, 35

Marshall v. Lunberger, 459 U. S. 447 (1983) (J. Blackmun, dissenting) 42

Nash v. United States, 54 F. 2d 1006 (2nd Cir. 1932) 37

TABLE OF AUTHORITIES - Continued

Page

Noor Mohammed v. The King, [1949] A.C. 182 32

People v. Allen, 429 Mich. 558, 420 N.W. 2nd 499 (1988) 35

People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901) 22, 23

People v. Municipal Court, etc., 158 Cal. Rptr. 739 (Cal. App. 2 Dist. 1979) 50

People v. Sanchez, 256 Cal. Rptr. 446 (Cal. App. 4 Dist. 1989) 31

People v. Smallwood, 722 P. 2d 197 (1986) 27

People v. Villa, 178 Cal. Rptr. 398, 125 Cal. App. 3d 872 (1981) 45

People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466 (1930) 35, 40

Pinkney v. United States, 363 F. 2d 696 (D.C. Cir. 1966) 22

State v. Berkelman, 355 N.W. 2d 394 (Minn. 1984) 48

State v. Craig, 219 Neb. 70, 361 N.W. 2d 206 (1985) 29

State v. Harris, 123 Wis. 2d 231, 365 N.W. 2d 922 (1985) 31, 35

State v. Jackson, 102 Wash. 2d 689, 689 P. 2d 76 (1984) 29

State v. Maurer, 150 Ohio St. 3d 239, 473 N.E. 2d 768 (1984) 49

State v. Newton, 109 Wash. 2d 69, 743 P. 2d 254 (1987) 41

State v. Roach, 109 Idaho 973, 712 P. 2d 674 (1985) 28

TABLE OF AUTHORITIES – Continued

Page

State v. Smith, 106 Wash. 2d 772, 725 P. 2d 951 (1986) 36

State v. Stewart, 219 Neb. 347, 363 N.W. 2d 368 (1985) 29

State v. Treadaway, 116 Ariz. 163, 586 P. 2d 1061 (1977) 32, 36

Thompson v. The King, [1918] A.C. 221 29

Thompson v. United States, 546 A. 2d 414 (D.C. App. 1988) 31

United States v. Adderly, 529 F. 2d 1178 (5th Cir. 1976) 28

United States v. Alessi, 638 F. 2d 466 (2nd Cir. 1980) 34

United States v. Banmiller, 310 F. 2d 720 (3rd Cir. 1962) 41

United States v. Brown, 873 F. 2d 1265 (9th Cir. 1989) 40

United States v. Brown, 880 F. 2d 1012 (9th Cir. 1989) 34

United States v. Buckhanon, 505 F. 2d 1079 (8th Cir. 1974) 49

United States v. Cardenas, 895 F. 2d 1338 (11th Cir. 1990) 48

United States v. Chaimson, 760 F. 2d 798 (7th Cir. 1985) 33, 45

United States v. Colon, 880 F. 2d 650 (2nd Cir. 1989) 46, 48

United States v. Daniels, 770 F. 2d 1111 (D.C. Cir. 1985) 32

TABLE OF AUTHORITIES – Continued

Page

United States v. Danzey, 594 F. 2d 905 (2nd Cir. 1979), *cert. denied*, 441 U.S. 951 (1979) 34

United States v. DeCicco, 435 F. 2d 478 (2nd Cir. 1970) 27

United States v. DeJohn, 638 F. 2d 1048 (7th Cir. 1981) 49

United States v. Doherty, 675 F. 2d 714 (D. Mass. 1987) 45

United States v. Durcan, 539 F. 2d 29 (9th Cir. 1976) 44

United States v. Fields, 871 F. 2d 188 (1st Cir. 1989) 40

United States v. Fierson, 419 F. 2d 1020 (7th Cir. 1969) 27, 33

United States v. Figueroa, 618 F. 2d 934 (2nd Cir. 1980) 34, 46

United States v. Gillespie, 852 F. 2d 475 (9th Cir. 1988) 41

United States v. Grassi, 602 F. 2d 1192 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980) 45, 46, 47

United States v. Goodwin, 492 F. 2d 1141 (5th Cir. 1974) 27

United States v. Gruttadauro, 818 F. 2d 1323 ..... 28, 33

United States v. Gubelman, 571 F. 2d 1252 (2d Cir. 1978) 31

United States v. Hadley, 918 F. 2d 848 (9th Cir. 1990) *passim*

United States v. Harris, 661 F. 2d 138 (10th Cir. 1981) 29

TABLE OF AUTHORITIES – Continued

Page

United States v. Harrod, 856 F. 2d 996 (7th Cir. 1988) 33

United States v. Hudson, 884 F. 2d 1016 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 3221 (1990) 33

United States v. Jacangelo, 281 F. 2d 574 (3rd Cir. 1960) 42

United States v. Kahaner, 317 F. 2d 459 (2nd Cir. 1963), *cert. denied*, 375 U.S. 836 (1963) 38

United States v. Kennedy, 714 F. 2d 968 (9th Cir. 1983) *cert. denied*, 104 S. Ct. 1305 (1984) 39

United States v. Manafzadeh, 592 F. 2d 81 (2nd Cir. 1979) 29, 46

United States v. Manganellis, 864 F. 2d 528 (7th Cir. 1988) 33

United States v. Manner, 887 F. 2d 317 (D. C. Cir. 1989) 45

United States v. Mansaw, 714 F. 2d 785 (8th Cir. 1983) *cert. denied*, 104 S. Ct. 403 (1983) 39

United States v. Mazzanti, 888 F. 2d 1165 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2167 (1990) 33

United States v. Mohel, 604 F. 2d 748 (2nd Cir. 1979) 48

United States v. Monzon, 869 F. 2d 338 (7th Cir. 1989), *cert. denied*, 109 S. Ct. 2087 (1989) 33

United States v. Myers, 550 F. 2d 1036 (5th Cir. 1977) 32

United States v. O'Connor, 580 F. 2d 38 (2nd Cir. 1978) 46

United States v. O'Shea, 724 F. 2d 1514 (11th Cir. 1984) 48

TABLE OF AUTHORITIES – Continued

Page

United States v. Oppon, 863 F. 2d 141 (1st Cir. 1988) 31

United States v. Ortiz, 857 F. 2d 900 (2nd Cir. 1988) .31, 46

United States v. Page, 808 F. 2d 723 (10th Cir. 1987) *cert. denied*, 42 U.S. 918 (1987) 39

United States v. Pedroza, 750 F. 2d 187 (2nd Cir. 1984), *cert. denied*, 107 S. Ct. 151 (1986) 46

United States v. Powell, 587 F. 2d 443 (9th Cir. 1978) .30, 34

United States v. Provenzano, 620 F. 2d 985 (3rd Cir. 1980) 48

United States v. Rabinowitz, 578 F. 2d 910 (2d Cir. 1978) 39

United States v. Reed, 700 F. 2d 638 (11th Cir. 1983) 39

United States v. Ring, 513 F. 2d 1001 (6th Cir. 1975) .27, 35

United States v. Robinson, 560 F. 2d 507 (2nd Cir. 1977), *cert. denied*, 435 U.S. 905 (1978) 34

United States v. Rubin, 733 F. 2d 837 (11th Cir. 1984) 39

United States v. Rubior Gonzales, 674 F. 2d 1067 (5th Cir. 1982) 40

United States v. Sampol, 636 F. 2d 621 (D.C. Cir. 1980) 45

United States v. Schwartz, 790 F. 2d 1059 (3rd Cir. 1986) 30

United States v. Shackleford, 738 F. 2d 776 (7th Cir. 1984) 35

United States v. Shapiro, 879 F. 2d 468 (9th Cir. 1989) 44

TABLE OF AUTHORITIES – Continued

Page

United States v. Silva, 580 F. 2d 144 (5th Cir. 1978) 31

United States v. Simon, 842 F. 2d 552 (1st Cir. 1988) 31

United States v. Soundingsides, 820 F. 2d 1232 (10th Cir. 1987) 31

United States v. Timpani, 665 F. 2d 1 (1st Cir. 1981) 50

United States v. Williams, 577 F. 2d 188 (2nd Cir. 1978), *cert. denied*, 439 U.S. 868 (1978) 46

United States v. Young, 567 F. 2d 799 (8th Cir. 1977) *cert. denied*, 434 U.S. 1079 (1978) 39

Whitty v. State, 34 Wis. 2d 278, 149 N.W. 2d 557 (1967), *cert. denied*, 390 U.S. 959 (1968) 31

CONSTITUTIONAL AND STATUTORY PROVISIONS

A.R.S. Sec. 13-1410 4

Model Penal Code Sec. 213.4, (A.L.I. 1980) 29

Rule 13.1 of the Rules of the Supreme Court of the United States 1

Rules 401, 402, 403 and 404, Federal Rules of Evidence .... *passim*

Sixth Amendment to the United States Constitution 1

Title 18 U.S.C. Sec. 1152 4

Title 18 U.S.C. Sec. 2241(a)(1) 6

Title 18 U.S.C. Sec. 2244(a)(1) 3

Title 18 U.S.C. Sec. 2244(a)(2) 6

Title 18 U.S.C. Sec. 2245(3) 18, 26

TABLE OF AUTHORITIES – Continued

Page

Title 18 U.S.C. Sec. 3509(d) 1

Title 18 U.S.C. Sec. 4205(a) 3

Title 28 U.S.C. Sec. 1254(1) 1

Title 28 U.S.C. Sec. 2101(b) 1

LEGAL PERIODICALS, REFERENCE BOOKS AND LEGISLATIVE HISTORY

The Advisory Committee's Notes to the 1972 Proposed Federal Rules of Evidence .... *passim*

The Advisory Committee's Notes to the 1991 Proposed Amendment to Rule 404(b) 21

G. Allport, *Personality – A Psychological Interpretation* 521 (1937) 24

G. Allport, *Traits Revisited*, 21 Am. Psychologist 1 (1966) 24

Case Comment, 2 Fla. St. U.L. Rev. 197 (1974) 25

Cowen & Carter, *Essays on the Law of Evidence* (1956) 30

Curtin, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant – Witness*, 45 Albany L. Rev. 1099 (1981) 42

Eichorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 Law and Contemp. Prob. 341 (1989) 42

Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 Univ. of Calif., Davis 59 (1984) .37, 38

TABLE OF AUTHORITIES – Continued

Page

Green and Loftus, *When Crimes are Joined at Trial*, 9 Law and Human Behav. 193 (1985) 42

Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 Ariz. L. Rev. 212 (1965) 25

Griswold, *The Long View*, 51 A.B.A. Journal 1017 (1965) 42

Hearings before Special Committee on Investigation of the Select Committee for Indian Affairs, Feb. 21, 22, 23, 27, 1989 (SHRG-101-126, Part 3) 2

Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. Law Rev. 604 (1989) 24, 44, 48

Imwenkerlied, *Uncharged Misconduct Evidence* (1984 and 1992 Supp.) ..... *passim*

Imwenkerlied, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 Emory L. J. 341 (1991) 43

H. Kalven & H. Zeisel, *American Jury* (1971) 42

Kyser, *Developments in Evidence of Other Crimes*, 7 J. of Law Reform 535 36

Ladd *Credibility Test – Current Trends*, 89 U. Pa. L. Rev. 166 (1941) 40

Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213 (1986) 28, 31, 48

TABLE OF AUTHORITIES – Continued

Page

Lawson, *Credibility and Character: A Different Look at an Interminable Problem* (1975), 50 Notre Dame Lawyer 758 ..... 25, 37, 38

London School of Economics Jury Project, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. (Eng.) 208 36

C. McCormick *On Evidence* (3rd Ed. E. Cleary 1984 and 1987 Supp.) 31, 49

Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 And The Impact of Recent Psychological Studies*, 31 U.C.L.A. Law Review 1003 (1984) 24, 37, 38

W. Mischel, *Personality and Assessment* (1968) 24

Vol. 10, *Moore's Federal Practice*, Sec. 403.02[3] (1988) 22

Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L. J. 763 (1961) 30, 36, 41

D. Peterson, *The Clinical Study of Social Behavior* (1968) 24

Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713 (1981) [Reed I] 22, 23, 24, 25

Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 Cin. L. Rev. 299 (1982) [Reed II] 30

Reed, *Admission of Other Criminal Act Evidence after Adoption of the Federal Rules of Evidence*, 53 Cincinnati L. Rev. 113 (1984) [Reed III] 25, 35, 36

TABLE OF AUTHORITIES – Continued

Page

Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297 (1982) 35

Shotwell, *Exclusion of Prior Acquittals: An Attack on the "Prosecurtor's Delight"*, 21 U.C.L.A. L. Rev. 892 (1974) 41

Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan L. Rev. 411 (1972) 24, 38

Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325 (1956) 24

Snively, *Time for Change: Evidentiary Safeguards Needed in Trials for Sex Offenses*, 11 Ind. L. Rev. 895 (1978) 36

James Sully's *The Human Mind* 24

Summers, *Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 Tenn. L. Rev. 515 (1969) 28

Tanford, Penrod, and Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behav. 319 (1985) 42

P. Vernon, *Personality Assessment: A Critical Survey* (1964) 24

Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 Journal Crim. Law, Crimin. and Pol. Sci. 15 (1962) 43

J. Weinstein & M. Berger, *Weinstein's Evidence*, (1985) 25, 33, 34, 39

Wigmore on Evidence, Sec. 193-94, 216 (1904) 24, 31

TABLE OF AUTHORITIES – Continued

Page

Wigmore on Evidence, Sec. 302 (3d ed. 1980)..... 29

Wigmore, *Principles of Judicial Proof* (1913)..... 24

Wissler and Saks, *On the Inefficacy of Limiting Instructions*, 9 Law and Human Behav. 37 (1985) 42

Wright & Graham, *Federal Practice and Procedure: Evidence* (1978) 28-29, 30, 44

OPINIONS BELOW

The judgment and sentence of the United States District Court for the District of Arizona was issued on August 21, 1989 (C.R. 160).[1] The opinion of the United States Court of Appeals for the Ninth Circuit dated November 14, 1990, is reported at 918 F. 2d 848 (9th Cir. 1990). (J.A. 173-82).

JURISDICTION

On September 9, 1990, the Court of Appeals for the Ninth Circuit issued an order denying Mr. Hadley's petition for rehearing and rejecting his suggestion for rehearing *en banc*. The jurisdiction of this Court was timely invoked under Title 28 U.S.C. Sec. 1254(1), 2101(b), and Rule 13.1 of the Rules of the Supreme Court of the United States. The petition for a writ of *certiorari* was mailed on December 6, 1991, and received by this Court on Monday, December 9, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutes are set forth in appendix to this brief:

Sixth Amendment to the United States Constitution

Rules 401, 402, 403, 404, 405, and 608 of the Federal Rules of Evidence

Title 18 U.S.C. Sections 2241 through 2245 [Sexual Abuse Act of 1986]

---

[1] Documents from the Clerk of the United States District Court for the District of Arizona will be designated "C.R.", followed by the appropriate docket control number. References to the Joint Appendix will be made by using the abbreviation "J.A.", followed by the pertinent page number(s). Reference to the transcript of the proceedings before the District Court will use the abbreviation "R.T.", followed by the appropriate volume and page numbers.

In order to comply with the spirit of the confidentiality provision of the Crime Control Act of 1990, Title 18 U.S.C. Sec. 3509(d), the names of the minor children have been referred to by their first name and the first initial of their last name only.

STATEMENT OF CASE

On March 31, 1988, Verl Hadley was arrested at his home near Kayenta, Arizona, which is located within the boundaries of the Navajo Indian Reservation. On April 27, 1988, Mr. Hadley was charged by indictment with eight counts of sexual misconduct regarding minor children. Then, on December 21, 1988, a superseding indictment was issued charging Mr. Hadley with eleven counts of sexual misconduct involving five minor children. (J.A. 3-7).

Mr. Hadley was a grade school teacher at a B.I.A. school in Chilchinbeto, Arizona, at the time of his arrest. Mr. Hadley's name surfaced while the F.B.I. was investigating another teacher on the Navajo Indian Reservation. Indeed, a rash of cases involving sexual misconduct on the part of B.I.A. teachers in Arizona have erupted over the past few years. Congressional hearings were held in Arizona during the pendency of Mr. Hadley's case concerning the perceived epidemic of sexual misconduct on the part of B.I.A. employees. See Hearings before Special Committee on Investigation of the Select Committee for Indian Affairs, Feb. 21, 22, 23, 27, 1989 (SHRG-101-126, Part 3).

Although Judge Carroll ruled that counts VII through XI of the superseding indictment would be severed – for purposes of trial – from counts I through VI, Judge Carroll also ruled that evidence relating to the first six counts of the superseding indictment would be admissible at the first trial as prior bad acts under Rule 404(b) of the Federal Rules of Evidence. (R.T., April 27, 1989, p. 8).

As a result, the first trial relating to Amadee R., Jonathan T., and Fernando Y. encompassed evidence relating to nearly all of the counts within the superseding indictment. In addition, Judge Carroll admitted evidence of other bad acts dating back seventeen years in time.

On May 18, 1989, the jury returned a verdict of guilty against Mr. Hadley on counts VII through IX (Amadee R.), and a verdict of not guilty on counts X and XI (Jonathan T. and Fernando Y.) of the superseding indictment. (R.T., Vol. 9,

p. 1820). Judge Carroll sentenced Mr. Hadley under the federal sentencing guidelines to imprisonment for a term of 108 months on counts VIII and IX, to be followed by a period of supervised release for a period of 60 months, as well as the imposition of a fine in the amount of $10,000.00. On count VII, which did not fall under the new sentencing guidelines, Judge Carroll sentenced Mr. Hadley to imprisonment for a term of 30 years pursuant to Title 18 U.S.C. Sec. 4205(a). An additional fine of $10,000.00 was imposed. Judge Carroll ordered that both sentences be served consecutively. (R.T., Post Trial Motions and Sentencing, pp. 38-41).

A. STATEMENT OF FACTS AND DISTRICT COURT PROCEEDINGS

1. Fernando Y. (Count XI) and Jonathan T. (Count X)

The government began its case by focusing upon count XI of the superseding indictment. Count XI charged Mr. Hadley with abusive sexual contact with Fernando Y., an Indian child under twelve years of age, on or about May, 1988. Count XI fails to specify the particular contact that was supposedly committed by Mr. Hadley. See Title 18 U.S.C. Sec. 2244(a)(1).

On direct examination, coached by leading questions, Fernando Y. testified that Verl Hadley touched his penis in one of the restrooms at the Chilchinbeto Day School. (R.T., Vol. 2, pp. 394-91). On cross examination, Fernando Y. revealed that Verl Hadley had never been one of his teachers. Mr. Hadley's classroom was in a separate building from Fernando's classroom. (R.T., Vol. 2, pp. 393-98). Fernando Y. testified that the touching incident occurred one week before his birthday, which falls on May 14th. Therefore, the alleged incident occurred on or about May 7, 1988.

Fernando Y. testified that the incident occurred on a day when Mr. Hadley was teaching school. (R.T., Vol. 2, pp. 398-400). Fernando recalled that Mr. Hadley had taught school for a series of days both before and after the alleged incident during May, 1988. Fernando Y. testified that he

reported the touching incident to the principal of the school, Joe Hardy, the same day that it occurred. (R.T., Vol. 2, pp. 408-09).

Fernando Y. confirmed that F.B.I. agents told him that Verl Hadley had touched the private parts of other boys. (R.T., Vol. 2, pp. 404-05). Although he did not know Verl Hadley very well, he testified that he did not like Verl Hadley because he looks like a queer and walks like a girl. In the end, Fernando Y. admitted that he was testifying against Verl Hadley because he didn't like him. (R.T., Vol. 2, pp. 414-418).

Fortunately, other witnesses established the fact that Mr. Hadley had been reassigned from the Chilchinbeto Day School to the B.I.A. office in Tuba City, Arizona, during February, 1988. (R.T., Vol. 6, pp. 1061-64). Although Mr. Hadley was in the school in order to meet with Mr. Hardy for about thirty minutes on May 19, 1988, at approximately 4:30 p.m., he was not in the school when classes were in session or at any other time during May, 1988. (R.T., Vol. 6, pp. 1208-11, 1221-22; Vol. 7, pp. 1265-69).

Next, the government presented the testimony of Jonathan T. Verl Hadley was charged with child molestation against Jonathan T. under state law through the Assimilative Crimes Act. See Title 18 U.S.C. Sec. 1152 and A.R.S. Sec. 13-1410. Unfortunately, count X of the superseding indictment simply states that Verl Hadley directly touched the private parts of Jonathan T. during October, 1986. Although Jonathan T. was interviewed by defense counsel prior to trial, he failed to mention the specific act relied upon by the government. The act was not disclosed to Mr. Hadley or his attorney until Jonathan T.'s testimony was admitted at trial.

Briefly, the government contended that Verl Hadley had provided Jonathan T. with a pair of sweatpants to replace a pair of torn pants that he was wearing at school. Aided by leading questions, Jonathon T. testified that Verl Hadley touched his "dick" in a storage room while the change of clothing was being completed. (R.T., Vol. 2, pp. 428-37).

The allegations involving Jonathan T. were developed and supplemented by a teacher at the Chilchinbeto Day

School, namely Thomas Edward Klanchnik. He testified that Verl Hadley had taken Jonathan T. out of his class without permission. He saw Jonathan T. return from the storage room with a "sheepish" look on his face. After the investigation of Verl Hadley commenced several years later, Mr. Klanchnik recalled the incident and brought it to the attention of the F.B.I. Mr. Klanchnik insisted that the tear in Jonathan's pants did not warrant a change of clothes. According to Mr. Klanchnik, none of the other students in the classroom noticed the tear. (R.T., Vol. 3, pp. 492-500).

On direct examination, however, Jonathan T. testified that he saw a teacher's aid, George Charley, in the hallway after he changed his pants. He did not recall seeing Mr. Klanchnik. (R.T., Vol. 3, p. 436). Contrary to Mr. Klanchnik, Jonathan also testified that other students at the school had, in fact, teased him about the tear in his blue jeans.

Prior to trial, Jonathan T. was interviewed by defense counsel, which resulted in a tape recorded statement. The tape recorded statement was played to the jury and the transcript of the statement was admitted into evidence during trial as Exhibit "I". (Def. Ex. I, R.T. Vol. 8, p. 1567, J.A. 134-66). Jonathan T. confirmed that the tape recorded statement was true and correct. He also confirmed that Verl Hadley had never touched him in any of his private parts. (R.T., Vol. 2, pp. 447-49; Def. Ex. "I", J.A. 162-63).

George Charley testified that Mr. Hadley accompanied Jonathan T. to the storage room in order to obtain some sweatpants. He was with Jonathan T. for approximately "two minutes". (R.T., Vol. 7, p. 1253). However, Mr. Charley testified that Jonathan T. took the sweatpants into the boy's bathroom and changed clothes by himself. Mr. Hadley did not go into the bathroom with Jonathan T. (R.T., Vol. 7, p. 1254).

Jonathan T.'s name did not come to the attention of the F.B.I. until he lived with Amadee R. and his family. Jonathan T. admitted that the allegations against Verl Hadley were "make believe" and the stories were "not fair". (Def. Ex. "I", J.A. 151-52, 164). Jonathan T. admitted that he made up a story against Verl Hadley for and was afraid of the F.B.I.

Jonathan T. also admitted that Amadee R. had told him to make up stories about Verl Hadley. (Def. Ex "I", J.A. 159-60). He made up stories about Verl Hadley in order to help Amadee R., who told him that he made up stories about Verl Hadley as well (Def. Ex. "I", J.A. 159-61). As related by Jonathan T., Amadee R. "made them up too."

2. Amadee R. (Counts VII, VIII, AND IX)

The charges leveled by Amadee R. against Verl Hadley are contained in Counts VII, VIII, and IX of the superseding indictment. Count VII charges Mr. Hadley with causing or attempting to cause Amadee R. to engage in anal intercourse by force "on or about October, 1987." Count VIII similarly charges Mr. Hadley with attempted anal intercourse by force on or about November, 1987. See Title 18 U.S.C. Sec. 2241(a)(1). Count IX charges Mr. Hadley with intentionally touching the genitalia of Amadee R. on or about February 1, 1988. See Title 18 U.S.C. Sec. 2244(a)(2).

As revealed by Amadee R., his testimony against Verl Hadley was well rehearsed. Amadee R. testified that F.B.I. Agent John Schafer had told him the content of his expected testimony. (R.T., Vol. 3, p. 573). For instance, when Amadee R. was asked "Do you remember something happening between you and Mr. Hadley?" and "When did that first happen . . . ?", Amadee R. responded by citing "October nineteen – 1987 – wait, yeah." (R.T., Vol. 3, p. 540).

On direct examination, Amadee R. testified that Verl Hadley had picked him up from his home in the White Mesa area near Chilchinbeto and driven him to Kayenta, Arizona, in order to attend a swimming session with other students. After swimming, Verl Hadley gave Amadee R. a ride home. According to Amadee R., Verl Hadley told him to sit on his lap and steer the car during the ride home. Amadee R. testified that Verl Hadley then inserted his "dick in my butt, then I just said 'Hey,' and moved back to the passenger side and I told him, 'take me home.' " (R.T., Vol. 3, p. 543). Then, Verl Hadley gave Amadee R. a ride home without further incident.

According to Amadee R., Verl Hadley also gave him a ride home from swimming class during November, 1987. Amadee R. testified that he thought that Verl Hadley was trying to do the same thing to him again. (R.T., Vol. 3, p. 544). However, Amadee R. testified that he merely sat on Verl Hadley's lap briefly and felt "[t]hat his dick was kind of like getting hard, then I just sat back on the passenger's side." He never sat on Mr. Hadley's lap again. (R.T., Vol. 3, p. 545).

Finally, Amadee R. testified that another incident occurred on February 1, 1988. (R.T., Vol. 3, p. 546). Again, Amadee R. went to a swimming class in Kayenta, Arizona. According to Amadee R., Mr. Hadley gave him a ride home again. This time, however, Mr. Hadley took Amadee R. to Mr. Hadley's house in Baby Rocks, Arizona.

According to Amadee R., Verl Hadley showed him a movie about "some black men that stole a little boy." (R.T., Vol. 3, p. 551). Verl Hadley asked him to take off his clothes and then placed lotion on his body. Eventually, Verl Hadley allegedly placed lotion "on my dick." "[H]e was kind of like trying to rub it in and then I just hurried up and pulled up my shorts." (R.T., Vol. 3, pp. 553-55). Amadee R. then told Verl Hadley to take him home. Amadee R. arrived home around 9:00 p.m. His older brother, Eddie R., Jr., watched Amadee R. arrive home. Amadee R. did not report the incident to his brother nor to his parents. (R.T., Vol. 3, pp. 556-57).

On cross-examination, Amadee R. admitted that he went to swimming sessions "because I wanted to go". (R.T., Vol. 3, p. 562). Although Amadee R. testified that Verl Hadley had never come to his house and picked him up to go swimming with other children in the car, other witnesses testified to the contrary. (See, e.g., R.T., Vol. 6, p. 1083).

Amadee R. testified that he and Verl Hadley were members of the same clan and considered to be "clan brothers" or "family members". (R.T., Vol. 3, p. 564). It was "common for people in the same clan to do things together like family members". (R.T., Vol. 3, pp. 564-65).

On February 1, 1988, Amadee R. had gone swimming with "a whole group of people . . . from the school". According to Amadee R., he was wearing only shorts. It was a "hot

day". Amadee R. estimated that the temperature was between 80 and 90 degrees. (R.T., Vol. 3, pp. 566-67). However, climatological data introduced at the time of trial showed that the high and low temperatures for February 1, 1988, were actually 25 and 39 degrees. (R.T., Vol. 6, p. 1236).

When Amadee R. was asked to describe Mr. Hadley's trailer, he was able to report that the outside of the trailer was "green and white". Mr. Hadley's trailer sits only a short distance from the highway. Nevertheless, Amadee R. denied that Mr. Hadley's trailer could be seen from the highway. (R.T., Vol. 3, p. 568). When Amadee R. was asked to describe the inside of the trailer, he simply reported that "it is just nice." (R.T., Vol. 3, p. 568). Amadee R. first reported that the inside of the trailer contained three rooms, but later said that it only contained one room. (R.T., Vol. 3, p. 569). Amadee R. could not remember whether or not other trailers surrounded Verl Hadley's trailer. (R.T., Vol. 3, p. 569).

Amadee R., like all of the other children, was interviewed by F.B.I. agents without parental permission or the presence of any adult other than law enforcement officials. The F.B.I. told Amadee R. that he could not leave the room during the interview. He testified that he was afraid of the F.B.I. agents. Amadee R. admitted that he felt that he had to tell the F.B.I. agents something about Verl Hadley before he could leave the room. (R.T., Vol. 3, pp. 574-75, 605-06).

Amadee R. testified that one of the B.I.A. investigators, Sammy Ahkeah, told him that Verl Hadley's hair looked like a girl's hair. (R.T., Vol. 3, p. 590). Amadee R. admitted that he now thinks of Verl Hadley as a "queer", but did not think of him as a "queer" until after he was interviewed by the F.B.I. on February 24 and 26, 1988. (R.T., Vol. 3, p. 591). Amadee R. also admitted that he didn't like Verl Hadley any longer after he was interviewed by the F.B.I. (R.T., Vol. 3, p. 592). Finally, Amadee R. admitted that he told the F.B.I. about Verl Hadley because he felt that he had to tell them something or he would get into trouble with the F.B.I. (R.T., Vol. 3, p. 592).

Amadee R. testified that he was being treated for rectal hernia during 1987-88. He admitted that the hernia was painful. (R.T., Vol. 3, p. 593). He also verified that he visited Dr.

Moore at the Public Health Service Hospital in Kayenta, Arizona, at least five times during December, 1987, and January, 1988. Nevertheless, Amadee R. never said anything to Dr. Moore about Mr. Hadley's alleged sexual misconduct.

Amadee R. also acknowledged that Jonathan T. had been living with his family prior to Christmas, 1988. (R.T., Vol. 3, p. 96). Amadee R. contended that he never talked to Jonathan T. about Verl Hadley. Of course, Jonathan T. expressly testified that Amadee R. had spoken to him extensively about Verl Hadley. (Def. Ex. "I", J.A. 159-61).

3. Other Witnesses

The bus driver for the Chilchinbeto School, John C. Billie, testified that Verl Hadley took Amadee R. home on February 1, 1988, because the school bus encountered mechanical difficulties. (R.T., Vol. 3, pp. 621-26). Amadee R.'s brother, Eddie R., Jr., testified that he observed Verl Hadley dropping Amadee R. off at his home after the swimming session on February 1, 1988. Amadee R. was not upset or troubled. He did not say anything to Eddie R. about Verl Hadley. Furthermore, he observed that Amadee R. was wearing long pants, not shorts. Eddie R., Jr., also recalled that it was freezing on February 1, 1988, rather than eighty or ninety degrees outside. (R.T., Vol. 3, pp. 633-39).

Dr. Kelly Moore, pediatrician, testified that she conducted a physical examination of Amadee R. during February, 1988, for the purpose of investigating potential sexual abuse. She reported that his exam was normal in all respects. He suffered from no lacerations, tears, or fissures. He maintained normal sphincter tone. (R.T., Vol. 3, pp. 640-42).

Moreover, Dr. Moore testified that Amadee R. suffered from an inguinal hernia, which involves the failure of a testicle to drop into the sack. During her treatment of Amadee R. for the hernia, he never complained of or showed any signs of sexual abuse. (R.T., Vol. 3, pp. 644-45).

Several other witnesses testified that Amadee R. was shy around adults and authority figures. However, the trial court precluded defense counsel from asking the witnesses whether

or not Amadee R. was subject to manipulation by adults. (R.T., Vol. 6, pp. 1094-96). Amadee R. was described as "uncomfortable with adults." (R.T., Vol. 6, p. 1099).

Several witnesses testified that Amadee R. was not a truthful person. Lorinda N., age seventeen, testified that Amadee R. is afraid of the police and the F.B.I. She testified that Amadee R. has been known to tell lies since he was a young boy. (R.T., Vol. 6, p. 1147). Gerald Nez, age twenty-two, also testified that he knew Amadee R. from the community church. According to Gerald Nez, Amadee R. not only tells lies, but also falsely accuses other people of misdeeds as well. (R.T., Vol. 6, pp. 1191-95).

4. Prior Bad Acts and FBI Intimidation

The trial of Verl Hadley turned into an evidentiary nightmare when it focused upon prior bad acts. Judge Carroll allowed expert psychiatric testimony from the government to bolster the credibility of the alleged victims. He also allowed the government to introduce extensive evidence of prior bad acts during the trial. Indeed, evidence relating to prior bad acts quickly overshadowed the rest of the trial. A substantial portion of the trial in Verl Hadley's case related to hotly contested evidence of prior bad acts.

On November 7, 1988, the government filed a Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts. (C.R. 44). The government identified prior bad acts relating to Cory K., Amadee R., and Junior H. The government's written motion stated that prior bad acts would show "that defendant's conduct was sexually motivated and not the result of a mistake or accident." Motion in Limine at pp. 7-8. The government also stated that the prior bad acts displayed a common "modus operandi or common plan".

Counsel for Mr. Hadley filed an extensive memorandum in opposition to the government's Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts. (C.R. 50). The memorandum stressed that evidence of prior bad acts was not only highly prejudicial, but irrelevant to any contested issue in the case. Mr. Hadley strenuously argued that neither

"intent" nor "motive" were contested issues at trial. Mr. Hadley's defense at trial readily showed, as he repeatedly promised, that neither intent nor motive were at issue.

The true purpose of the prior bad act evidence, namely propensity, was not always well hidden during trial. At times, the stated purpose of proving the uncontested element of "intent" only thinly masked the most logical application of the evidence, namely propensity. Counsel for the government argued that the admission of prior bad acts "would be extremely probative in helping the jury to determine whether or not the defendant used, in fact, the same method for this conduct and therefore committed the acts in question." (R.T., Vol. 3, pp. 660-62, J.A. 14-16). The prior bad act evidence would "establish that this was not just a one time occurrence, this was not a mistake, this was not an accident . . . ". *Ibid.*

Counsel for Mr. Hadley argued that the alleged victims in this case were influenced by government agents to testify against Mr. Hadley. Mr. Hadley's defense was that he did not commit the acts in question. Mr. Hadley never argued that he may have accidently or mistakenly touched the private areas or sodomized children or that he did so for a purpose other than sexual gratification. The government's purported justification for admitting the prior bad acts was nothing more than a red herring. (R.T., Vol. 3, pp. 660-61, J.A. 14-16).

Judge Carroll reasoned that prior bad acts relating to sodomy would be helpful to the jury in determining Mr. Hadley's motive in merely touching other boys. In other words, according to Judge Carroll, prior bad act testimony would be admissible to show the jury that Mr. Hadley's true motive in touching children was eventually to lead up to sodomy. Yet somehow, Judge Carroll concluded that he was not admitting the prior bad acts for the purpose of showing propensity. (See, e.g., R.T. Vol. April 27, 1989, p. 8, J.A. 12-13, and Vol. 3, pp. 661-62, J.A. 15-16).

Counsel for Mr. Hadley strenuously objected to the admissibility of prior bad act evidence. Defense counsel warned that "the prejudice is absolutely incredible and there would be no way to control that with any instructions . . . in addition, it would require a trial on collateral issues that, by

the time that we are done, will far overshadow the issues that are being tried now." (R.T., Vol. 3, p. 669, J.A. 17-21).

Judge Carroll summarized his position by stating that, "The jury ought to know what kind of person Mr. Hadley is, because it relates to his motive for doing things, or his intention for doing things with these children. . . . Common sense tells me that the jury ought to know something about Mr. Hadley. . . . because it does deal with his motive, his intention and whether or not he was a good guy . . . ". (R.T., Vol. 3, pp. 670-672, J.A. 21-23).

Defense counsel for Mr. Hadley explicitly offered to stipulate that, if any touching occurred by Mr. Hadley, then it occurred for the purpose of sexual gratification. (R.T., Vol. 4, p. 687, J.A. 29-30). Both the trial court and the government refused to consider Mr. Hadley's proposed stipulation. (Also see R.T., Vol. 4, pp. 856-57; Vol. 5, pp. 879-884, J.A. 33-36; Supplemental Memorandum in Opposition to Government's Motion in Limine, J.A. 167-71).

Although the government's motion in limine regarding prior bad acts set forth specific instances of sexual activity between Cory K. and Mr. Hadley, the government asked Cory K. about numerous, unspecified prior bad acts. Mr. K. testified that he engaged in anal intercourse with Mr. Hadley on more than ten occasions. (R.T., Vol. 5, p. 897, J.A. 75-76). Then, Cory K. testified about an incident that allegedly occurred on September 5, 1985. (R.T., Vol. 5, p. 900, J.A. 78). Mr. K. testified that he watched a movie with Mr. Hadley and then engaged in anal intercourse with him while sitting and laying in different positions. (R.T., Vol. 5, pp. 900-903, J.A. 78-80). Then, Mr. K. was allowed to testify about the general course of sexual conduct between he and Mr. Hadley on other, unspecified incidents. (R.T., Vol. 5, pp. 909-10, J.A. 84-85).

On cross-examination, Cory K. testified that he was present on September 5, 1985, with several other persons at Mr. Hadley's residence. Cory K. first testified that he did not drink, but later admitted that he drank alcohol on September 5, 1985. (R.T., Vol. 5, pp. 927-29, J.A. 97-98). He similarly first denied that he drank alcoholic beverages as a general practice prior to September 5, 1985. Later, he admitted that he

got drunk whenever alcohol was offered to him. (R.T., Vol. 5, pp. 927-29, J.A. 97-98).

Cory K. admitted that he drank several cans of beer, as well as shot glasses of gin and Bacardi, on September 5, 1985. He couldn't remember what else he had drunk. He also admitted that he passed out after he drank the alcohol. When he awoke, his clothes had been removed. He assumed that Verl Hadley had sex with him since he was the only one present at the trailer when he awoke. Later, he contended that he remembered "a little bit" about what occurred that night. Mr. K. admitted that he wasn't awake when the sex acts supposedly occurred. (R.T., Vol. 5, p. 928-30, J.A. 98-99).

Cory K. also testified that he was previously interviewed by officers from the Navajo Division of Public Safety relating to the same incident. A charge had been instituted against Mr. Hadley before the Navajo Tribal Court. But, Cory K. refused to testify in support of the accusation. According to Mr. K., he refused to testify because he could not get a ride to court. (R.T., Vol. 5, pp. 947-49, J.A. 111-12).

Cory K. also admitted that he was taken to a doctor for a sexual assault exam during 1985. At that time, the doctor discovered that he had venereal warts. Cory K. testified that he was told by the F.B.I. that if he made a statement against Verl Hadley, he would not have to testify in court. (R.T., Vol. 5, p. 949, J.A. 112-13). Cory K. admitted that he had difficulty remembering conversations that took place relating to the incident of September 5, 1985. (R.T., Vol. 5, p. 954). Despite the fact that Cory K. testified that he had venereal warts, Dr. Ashton testified that Verl Hadley was examined during October, 1985, and was found not to have any venereal warts or diseases. (R.T., Vol. 5, pp. 1046-48).

Unfortunately, the defense was forced into calling numerous witnesses in order to rebut the prior bad act testimony of Cory K. First, Raymond Laughter, former Sergeant with the Navajo Division of Public Safety, testified that he investigated allegations by Mr. K. against Verl Hadley during October, 1985. The story given to Sgt. Laughter was significantly different than the story offered by Cory K. at the time of trial. Further, Sgt. Laughter testified that, in his opinion,

Cory K. was not a truthful person. Sgt. Laughter testified that Cory K. had a reputation in the community of Kayenta of being untruthful.

The second investigating officer for the Navajo Division of Public Safety, Rueban Wiseman, testified that Cory K. never mentioned that he needed a ride to court in order to testify against Mr. Hadley. Mr. Wiseman testified that the Navajo Division of Public Safety would have provided a ride to Cory K. if one was needed. (R.T., Vol. 5, p. 986). Cory K. signed a declaration stating that he would not willingly testify against Verl Hadley. (R.T., Vol. 5, p. 987).

Several persons that were also accused of sexual misconduct by Cory K. during 1985, namely Sampson Yazzie, Arnold Dohi, and Morris Singer, testified at trial as well. Each of the witnesses contradicted the testimony of Cory K. Sampson Yazzie testified that Cory K. was an excessive drinker, was untruthful, and was never seen at Verl Hadley's trailer. Arnold Dohi testified that Cory K. was both a drunk and a liar. (R.T., Vol. 6, pp. 1104-08, 1123-26).

Morris Singer not only testified that Cory K. was both a drunk and a liar, but also testified that Cory K. was "out to get" Verl Hadley. During the summer of 1985, Cory K. threatened to vandalize Mr. Hadley's property and hurt him in different ways. (R.T., Vol. 6, p. 1142). Although Morris Singer was someone that Cory K. confided in during 1985, he never told Morris Singer that he had sexual relations with Verl Hadley. (R.T., Vol. 6, p. 1143).

Several additional witnesses testified that Cory K. was well known as a liar, including Lisa Charley (R.T., Vol. 5, pp. 992-95) and Calvin Hatathlie (R.T., Vol. 5, p. 1028).

One of the witnesses listed by the government to support evidence of prior bad acts, Junior H., testified for the defense. Junior H. testified that he repeatedly told the F.B.I. that Verl Hadley had not touched him. Nevertheless, F.B.I. Agent Schafer accused Junior H. of lying. F.B.I. agents told Junior H. that he had been seen in a car doing something "bad" with Verl Hadley. (R.T., Vol. 5, p. 1004). Junior testified that he was eventually forced by the F.B.I. to make up stories about Verl Hadley. (R.T., Vol. 5, pp. 1004-06).

Later, Junior told other members of his family that he had been forced to lie about Verl Hadley. He missed eleven days of school because he was upset. Later, he contacted the F.B.I. and told them that his stories about Verl Hadley were not true. (R.T., Vol. 5, pp. 1005-10).[2]

B. TESTIMONY OF VERL HADLEY AND THE GOVERNMENT'S CONTINUED CHARACTER ASSASSINATION.

Verl Hadley testified at trial and denied the accusations contained within Counts VII-XI of the superseding indictment. On cross-examination, the government was allowed to question Verl Hadley about numerous, unspecified prior bad acts. The government was allowed to put Mr. Hadley's character and lifestyle on trial, rather than the incidents in question. For instance, the government, over strenuous objections by the defense, continuously asked Mr. Hadley whether he gave automobile rides to minor students (R.T., Vol. 7, pp. 1337 and 1340, J.A. 113-15); whether he ever had any male students as guests at his residence; whether he ever provided

---

[2] On cross-examination, the government questioned Junior H. about the prior statements that he gave to the F.B.I. Junior H. testified sternly that the statements were not true. Nevertheless, Judge Carroll refused to give a limiting instruction to the jury. Of course, it is beyond doubt that the prior, recanted and inconsistent statements of Junior H. could not be used as substantive evidence, but may merely for impeachment. (R.T., Vol. 5, pp. 1014-15). Other students provided additional reports of F.B.I. intimidation.

Evidence of prior bad acts involving Travis Y. was not admitted due to the fact that Travis Y. stated that they never occurred. Instead, Travis Y. accused the F.B.I. agents of pressuring him to make incriminating statements against Mr. Hadley. His statements were consistent with many other witnesses who testified that the F.B.I. had pressured them into making incriminating statements against Mr. Hadley. (R.T., Vol. 4, pp. 816-44).

Another student at the Chilchinbeto School, Duane C., age fifteen, testified that the F.B.I. accused him of not telling the truth when he told them that Verl Hadley had not touched him. (R.T., Vol. 5, p. 1038). Yet another student at the Chilchinbeto Day School, Marlow S., age fifteen, also testified that he was repeatedly interviewed by the F.B.I. Although he informed the F.B.I. that Verl Hadley had never touched him inappropriately, the F.B.I. insisted that he was not telling the truth. (R.T., Vol. 6, pp. 1077-78).

alcohol to any male students; whether or not he had a reputation for touching male students in his classes; and whether he had a reputation for tickling students on their thighs or on their backs (R.T., Vol. 7, pp. 1342-44, J.A. 116-18).

Then, the government was allowed to question Mr. Hadley about a traffic citation that he received during 1976 for supposedly allowing an unauthorized minor person to drive his vehicle. No conviction resulted. Although defense counsel strenuously objected, Judge Carroll posited the view that a criminal defendant may be cross-examined on extrinsic matters and prior bad acts more broadly than other witnesses. (R.T., Vol. 8, pp. 1426, 1435, and Vol. 9, pp. 1632-33).

Although the government presented no evidence of any sexual misconduct, counsel for the government was allowed to ask Mr. Hadley whether or not it was unusual for him to allow minor males to sit on his lap and drive his car. The government insinuated that misconduct occurred. According to counsel for the government, a character assassination was appropriate: "He puts his character in issue when he takes the stand." (R.T., Vol. 7, p. 1343).

The government was allowed to cross-examine Mr. Hadley about whether or not he associated with persons much younger in age. (R.T., Vol. 7, p. 1349). Over strenuous objections by Mr. Hadley's attorney, the government was also allowed to ask Mr. Hadley whether or not he had ever engaged in sexual relations with any minors. (R.T., Vol. 7, p. 1375, J.A. 122-23). The government successfully argued to the trial court that it could bait Mr. Hadley by asking him open-ended questions about unspecified, prior bad acts and then, if he generally denied them, introduce evidence of any prior bad acts that may arguably have occurred at any time in history. (R.T., Vol. 7, p. 1376-77, J.A. 123-24).

C. ADDITIONAL PRIOR BAD ACTS – DATING BACK SEVENTEEN YEARS.

Near the close of the trial, the government reportedly discovered a potential witness from Colorado, who was willing to testify that Verl Hadley had repeatedly engaged in anal

intercourse with him seventeen years earlier. (R.T., Vol. 7, pp. 1404-08 and 1415-16). Once again, strenuous objections by defense counsel were to no avail. (R.T., Vol. 8, pp. 1420-16; Vol. 9, pp. 1631-44 and 1648-49). The court reasoned that "the methods of proof that are available to the government" in cases from Indian reservations, where people are "unsophisticated", requires a more liberal rule regarding uncharged misconduct evidence. (R.T., Vol. 9, pp. 1644-45).

Kyle Hartman was allowed to testify that he had engaged in a series of sexual relations with Verl Hadley from 1972 to 1976 when he was a student in Kayenta, Arizona. At that time, Mr. Hadley was a teacher's aid. (R.T., Vol. 9, pp. 1663-73, J.A. 125-33). Mr. Hartman, age twenty-seven, was allowed to testify about numerous, specific acts of sodomy with Verl Hadley that supposedly occurred when he was in grade school. Mr. Hartman testified that he sodomized Mr. Hadley as well. (R.T., Vol. 9, p. 1670, J.A. 130-31).

During closing argument, the government specifically used the testimony of Kyle Hartman to show Mr. Hadley's propensity to engage in sexual conduct with minor children. The government used the testimony of Kyle Hartman to show that Verl Hadley lied when he said he did not have sexual intercourse with minor children. (R.T., Vol. 9, p. 1729). In the same vein, counsel for the government also used the 1976 traffic ticket to argue propensity against Mr. Hadley. (R.T., Vol. 9, p. 1796). The government hinted that both the testimony of Cory K. and Kyle Hartman could be used to show Mr. Hadley's propensity. (R.T., Vol. 9, p. 1798).

D. COURT OF APPEALS PROCEEDINGS

The opinion of the Court of Appeals for the Ninth Circuit approves the admission of all prior bad acts against Mr. Hadley. Employing superficial analysis, the Court of Appeals found all bad acts appropriate since they were "similar" and offered to establish a "specific intent" crime. Little attention was directed to the need for the evidence to establish "intent" or the severe prejudice created by massive evidence of prior

sexual misconduct against children. *United States v. Hadley*, 918 F. 2d 848 (9th Cir. 1990) (J.A. 173-182).

In short, the Court of Appeals applied the "inclusionary rule" of Rule 404(b) without much attention to the pivotal, balancing provision of Rule 403, Federal Rules of Evidence. The Court of Appeals steadfastly refused to consider the judicial admission or proposed stipulation of Mr. Hadley. If the jury found that the acts occurred, Mr. Hadley agreed that they took place for the purpose of arousing the "sexual desire of any person." See Title 18 U.S.C. Sec. 2245(3). Likewise, the Court of Appeals failed to assess the technical or marginal nature of the "specific intent" at stake or the availability of alternate methods of proof.

The opinion of the Court of Appeals is inconsistent with the purpose and key role of Rule 403. Its refusal to review the issue of "specific intent" within the context and particulars of Mr. Hadley's case virtually rendered Rule 403 meaningless. The appellate review offered by the Ninth Circuit in *Hadley* left Rule 403 without any principled guidelines. The *Hadley* decision sets the Ninth Circuit apart from the majority of better-reasoned decisions from other federal circuits.

SUMMARY OF ARGUMENT

Mr. Hadley was charged and convicted of several violations of the Sexual Abuse Act of 1986, which required that he engage in sexual contact with the "intent" to "arouse the sexual desire of any person". See Title 18 U.S.C. Sec. 2245(3). Mr. Hadley's exclusive defense at trial was that the acts did not occur. He conceded the issue of "intent" approximately five months before trial and offered to stipulate to the issue of "intent" during trial.

Mr. Hadley strenuously opposed the introduction of massive amounts of extremely prejudicial prior bad acts to establish the issue of "specific intent" since "intent" was not a disputed issue at trial. The acts of sexual contact alleged against Mr. Hadley necessarily implied "intent" or sexual gratification. The "intent" component of the statute was designed to distinguish between innocent or accidental touchings

from improper sexual contact. But accident or mistake were not issues at trial.

In short, the government simply didn't need evidence of prior sexual misconduct to establish the requisite element of "intent". The incremental, probative value of the prior bad acts was slight, while the unfair prejudice flowing from them reached alarming proportions.

Nevertheless, the trial court allowed the government to introduce layer upon layer of prior misconduct evidence both during its case-in-chief and again during rebuttal. The prior bad acts detailed explicit sexual activity dating back seventeen years. Mr. Hadley was bludgeoned into conviction through the misuse of prior bad acts.

Although Rule 404(b) is an "inclusionary rule" of evidence, which allows the introduction of prior bad acts if relevant to a material issue at trial, the Federal Rules of Evidence have placed special emphasis upon the balancing provision of Rule 403. The Advisory Committee's Notes and pertinent case law require the trial court to consider the "availability of other means of proof", the effectiveness of limiting instructions, unfair prejudice, and the need for the disputed evidence. But, the trial court and the Court of Appeals abandoned the delicate balancing process of Rule 403 in favor of a standard rule that prior misconduct evidence is admissible whenever a "specific intent" crime has been charged. The courts below erroneously concluded that judicial admissions and stipulations need not even be considered. In the face of prejudicial evidence of the highest order calling for a principled balancing process under Rule 403, the courts below created a *per se* rule of admissibility.

We submit that the balancing process of Rule 403 should not be categorically removed from cases involving "specific intent" crimes. Instead, the incremental probative value and unfair prejudice of the challenged evidence should be carefully weighed in light of the various factors presented by the case or, in other words, in a contextual setting. The balancing approach was especially required in this case since the issue of "intent" constituted only a technical or marginal issue and was not disputed.

We submit that no rigid rule dictating the absolute refusal or acceptance of a judicial admission or stipulation is appropriate under Rule 403. Instead, a careful review of the proposed stipulation should occur within the context of all the evidence in the case. Careful attention must be focused upon the incremental, probative value of the proffered evidence, its prejudicial effect, and the availability of other means of proof. We believe that this Court should approve a sensible, middle-ground position that allows a case-by-case review under Rule 403.

ARGUMENTS

A. EXCESSIVE PRIOR BAD ACT EVIDENCE IN THIS CASE WAS NOT ONLY IRRELEVANT, BUT HIGHLY PREJUDICIAL. THE EXCESSES OF THE GOVERNMENT AND TRIAL COURT BLATANTLY DENIED MR. HADLEY A FAIR TRIAL.

The trial court not only repeatedly allowed evidence of prior sexual misconduct, but also progressive sexual misconduct between Mr. Hadley and minor children for the avowed purpose of showing the jury that "[t]he touching was leading up to the sodomy". (R.T., Vol. April 27, 1989, p. 8). Mr. Hadley's trial was little more than a lawless character assassination.

The only genuine issue at trial was whether or not the acts alleged against Mr. Hadley actually occurred. Mr. Hadley's defense was solely that he did not commit the acts alleged against him. Neither "intent" nor "motive" were contested issues in the case. Mr. Hadley contended that the minor children had been unduly influenced by the F.B.I. to accuse him of misdeeds that he did not commit.

1. The Federal Rules of Evidence – The Key is Balancing Probative Value Against Prejudice. The Key was Thrown Away in Mr. Hadley's Case.

Rule 404(a) of the Federal Rules of Evidence allows the accused to present evidence of pertinent character traits that

she possesses, but precludes the government from doing so except to rebut the evidence offered by the accused. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ". Rule 404(b) provides that evidence of other crimes, wrongs, or acts is admissible, however, for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[3]

Of course, Rule 403 requires the trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." See The Advisory Committee Notes to the 1972 Proposed Rules.

> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. . . . The availability of other means of proof may also be an appropriate factor.

Advisory Committee's Notes to the 1972 Proposed Rules.

The prejudice flowing from the use of prior convictions or prior bad acts has been repeatedly and soundly noted in American Jurisprudence. As observed by Judge Skelly Wright, prior misconduct evidence:

> . . . not only permits the prosecutor to throw doubt upon the defendant's testimony regarding the facts of the case being tried, but also may result in casting such an atmosphere of aspersion and

---

[3] Subsequent to Mr. Hadley's trial, Rule 404(b) was amended to require the prosecution in a criminal case, upon request of the accused, to provide reasonable notice in advance of trial of any evidence of other crimes, wrongs, or acts that the government intends to introduce at trial. The 1991 amendment to Rule 404(b) "is intended to reduce surprise and promote early resolution on the issue of admissibility." See The Advisory Committee Notes to the 1991 Proposed Amendment.

> disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community. [cites omitted].

Pinkney v. United States, 363 F. 2d 696, 698 (D.C. Cir. 1966). The delicate balancing process of Rule 403 of the Federal Rules of Evidence must be utilized to insure a fair trial.

Of course, irrelevant evidence is inadmissible under Rule 402, Federal Rules of Evidence. In order to be relevant, evidence must be material to an issue in the case. See Rule 401. "If the relevancy of the proffered evidence is suspect or slight but would likely be prejudicial then any justification for its admission is slight or non-existent." Vol. 10, *Moore's Federal Practice*, Sec. 403.02[3] (1988).

The rule excluding evidence of prior bad acts emerged in England in response to the Star Chamber proceedings. The Treason Act of 1695 expressly provided that an overt act not stated in the indictment could not be proven at trial. Eventually, the principles of the Treason Act of 1695 became the standard for basic fairness in criminal trials throughout England. By the end of the Eighteenth century, England employed a general rule excluding evidence of other crimes and accusations not listed in the indictment. Of course, exceptions to the exclusionary rule later developed. See, Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713 (1981) [hereinafter referred to as *Reed I*].

Indeed, some of the provisions of the Treason Act of 1695 were later incorporated into the charters of various American colonies and eventually appeared in the Bill of Rights to the Federal Constitution. *Reed I* at p. 721. American jurisprudence generally provided for a rule of exclusion with several, identified exceptions. The American rule was delineated in the landmark decision of *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 294-310 (1901).

In many cases intent may be inferred from the nature of the act alone. In *Molineux*, the question was whether or not the defendant intended to kill through the use of poison.

> Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that, in the face of such irrefragable indicia of murderous intent, it is still necessary or proper to prove the commission of other similar crimes to establish intent?

61 N.E. 286, 296 (N.Y. 1901). The *Molineux* court held that the prosecution could not rebut the defense of accident or mistake by anticipation, but if the defense raised accident or mistake, then the prosecution could use evidence of other criminal activity to rebut the defense. 61 N.E. 286, 298-99 (N.Y. 1901). The same queries and conclusions apply to the case at bar.

> It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake. The same irrefutable logic of fact and circumstance that establishes felonious intent as clearly negatives the possibility of accident or mistake.

People v. Molineux, 61 N.E. 286, 298-99 (N.Y. 1901). *Molineux* has been cited extensively by state and federal courts since 1901. It has served as "the basis for the jurisprudential development of the rule in both federal and state courts." *Reed I* at p. 735.

Of course, the Federal Rules of Evidence adopted an "inclusionary rule" rather than an "exclusionary rule" regarding evidence of other crimes. In other words, evidence of other crimes is admissible for any relevant purpose other than to prove the accused's bad character. The inclusionary rule is restricted by the provisions of Rule 403, which require the exclusion of character evidence if the prejudice to the accused substantially outweighs its probative value.

To a great extent, the inclusionary rule parallels Dean Wigmore's character rule. Wigmore argued that evidence of prior bad acts should be excluded only when they are offered

to establish the accused's propensity to commit the crime. *Wigmore on Evidence*, Sec. 193-94, 216 (1904). Wigmore employed behavioral theory of his day to support his proposition that a specific fact may be inferred from the general disposition of the actor. See Wigmore, *Principles of Judicial Proof* (1913).

> Wigmore dedicated the book to Hans Gross, a leading exponent of "criminal psychology." Wigmore included in his own treatment of proof excerpts from Gross' writing on habit formation and the predictability of future human behavior from prior human conduct. Wigmore also used extracts from James Sully's *The Human Mind* to illustrate his nascent science of proof.

Reed I at p. 737.[4]

---

[4] In essence, Wigmore preferred a form of "deterministic human behavioral science" to support portions of his treatise on character evidence. *Ibid.* The popularity of American stimulus-response learning theory gave further scientific respectability to the use of prior criminal acts to prove that an individual would repeat similar crimes in the future when exposed to similar exterior stimuli. *Reed I* at p. 739.

"Early psychological theories supported the common law's intuition that character evidence was predictive of behavior . . . 'Trait theory' essentially holds that the behavior of a given individual is governed by personality traits that exert sufficient influence to produce generally consistent behavior in widely divergent situations." Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 And The Impact of Recent Psychological Studies*, 31 U.C.L.A. Law Review 1003 at 1051 (1984). One of the chief proponents of "trait theory", however, has now acknowledged its weakness. Compare, G. Allport, *Personality – A Psychological Interpretation*, 521 (1937), and G. Allport, *Traits Revisited*, 21 Am. Psychologist 1, 9 (1966). Modern emperical studies have rejected the trait theory. See e.g., W. Mischel, *Personality and Assessment* (1968); D. Peterson, *The Clinical Study of Social Behavior* (1968); P. Vernon, *Personality Assessment: A Critical Survey* (1964).

In particular, modern research has also discredited the old belief that the recidivism rate among sex offenders is extraordinarily high. The Federal Bureau of Investigation has even rated the recidivism rate among sex offenders as quite low. See, e.g., Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 4:16 (1984); Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. Law Rev. 604, 616 (1989); Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 424 (1972); Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325, 335-36 (1956); Gregg, *Other Acts of*

(Continued on following page)

The "inclusionary rule" has placed special emphasis upon the balancing provision of Rule 403, which authorizes exclusion of relevant evidence by the trial court. Rule 403 was designed to override all other evidentiary rules. J. Weinstein and M. Berger, *Weinstein's Evidence*, Sec. 403[01] (1985).

> Thus, the discretionary balancing test of Rule 403 is the only check on the admission of extrinsic and intrinsic criminal acts of the accused not listed in the indictment. If the courts are to find an adequate solution to the dilemma, they must apply principled guidelines when weighing the probative value of the extrinsic or intrinsic criminal act against the prejudice it would cause to the accused.

Reed, *Admission of Other Criminal Act Evidence after Adoption of the Federal Rules of Evidence*, 53 Cin. L. Rev. 113, 169 (1984) [hereinafter referred to as *Reed III*]. "The federal rules' expansion of the scope of prosecutorial use of evidence of other crimes and the federal courts' willingness to admit such evidence is subtly transforming the American criminal justice system from an accusative to an inquisitorial process." *Reed I* at p. 714.

If anything other than broad judicial discretion applies to the balancing test of Rule 403, when used in conjunction with Rule 404(b), then the admission of overwhelming prior bad act evidence in Mr. Hadley's case was inappropriate. Clearly, some limits should apply. If any rational limit exists, then the facts of this case show that the limit was exceeded.[5]

(Continued from previous page)

Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 Ariz. L. Rev. 212, 232-33 (1965); Case Comment, 2 Fla. St. U.L. Rev. 197, 201 (1974). Also see, Lawson, *Credibility and Character: A Different Look at an Interminable Problem* (1975), 50 Notre Dame Lawyer 758, 780-83 (Describing Wigmore's reliance on psychological studies of his day, which have been discredited by contemporary studies). The logic of the rules of character evidence, especially the inclusionary provision of Rule 404(b), has proven to be incongruent with empirical data unless tempered by Rule 403.

[5] This Court has previously recognized that character evidence should be excluded unless relevant to a "disputed issue". This Court has expressed concern

(Continued on following page)

2. "Intent" was only a Technical Issue – A Red Herring. "Intent" Could be Inferred from the Nature of the Act Alone.

Of course, we recognize that Mr. Hadley was charged with specific intent crimes. As emphasized by the Court of Appeals for the Ninth Circuit, "[t]o demonstrate sexual contact the government had to prove that Hadley acted 'with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.' Title 18 U.S.C. Sec. 2245(3). The district court found that the prior acts 'have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature.' " *Hadley*, 918 F. 2d 848, 851.

But, the analysis employed by the Court of Appeals is superficial to the point of being nonexistent. The Ninth Circuit emphasized that "the evidence helped to demonstrate specific intent, the proof of which was required in all three counts. On this basis, it was properly admitted." *Hadley*, 918 F. 2d 848, 851 (9th Cir. 1990). As a result, the Court of Appeals concluded that the admission of apparently limitless prior bad acts against Mr. Hadley was justified. Little analysis regarding "materiality" or the balancing test of Rule 403 was employed. We submit that the Court of Appeals has authorized broad character assassinations under the facade of allowing evidence of other crimes to prove specific intent under Rule 404(b). Clearly, something more is needed in order to provide true meaning to the balancing test of Rule 403 and to return some semblance of a fair trial to accused citizens.

The utility of the balancing process under Rule 403 cannot be denied in cases involving sexual misconduct against children. The relative amount of prejudice is extremely high. It would be ridiculous, we submit, to allow an

---

(Continued from previous page)

"that unduly prejudicial evidence might be introduced under Rule 404(b)." *Huddleston v. United States*, 485 U.S. 681, 685 and 691 (1988). Although this Court found that evidence of the "battered child syndrome" in the face of a claim of accidental injury did not create errors that rose to the level of a due process violation in *Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed.2d 385, 396-97 (1991), this Court has not directly addressed the important issues raised by Mr. Hadley. *McGuire* was a federal *habeas corpus* action which reviewed matters of state law.

open door policy of admitting prior misconduct evidence outside the scope of the balancing test employed by Rule 403 in cases involving allegations of sexual misconduct toward children. Instead, these volatile cases require the balancing test of Rule 403 more than any other category of cases.[6]

The issue of "intent" relied upon by the Ninth Circuit is evanescent. It is simply impossible to argue with a straight face that Verl Hadley could attempt to insert his penis into the anal opening of a young boy for some purpose other than sexual gratification. Five months prior to trial, Mr. Hadley unequivocally stated that neither "intent" nor "motive" were disputed or genuine issues in the case.

Federal courts have excluded evidence of other crimes or misconduct in cases involving specific intent crimes when the intent required by the statute could be inferred from the nature of the act. *United States v. Ring*, 513 F. 2d 1001, 1004-09 (6th Cir. 1975); *United States v. Goodwin*, 492 F. 2d 1141, 1148-55 (5th Cir. 1974); *United States v. DeCicco*, 435 F. 2d 478, 483-84 (2nd Cir. 1970); *United States v. Fierson*, 419 F. 2d 1020, 1022-23 (7th Cir. 1969).

> Whether there is a material issue as to this element of intent depends not on the statutory definition of the offense but on the circumstances of the case and the nature of the offense. A defendant who admits committing an act but relies on innocence, mistake, or lack of knowledge to exculpate him has made an

---

[6] Experienced trial attorneys know that the judge's ruling on the admission of uncharged misconduct can be the turning point in a trial. Uncharged-misconduct evidence "will usually sink the defense without a trace." Some veteran defense attorneys shape their entire trial strategy to avoid the admission of uncharged misconduct.

> The available research data confirms this belief. . . . The uncharged misconduct stigmatizes the defendant and predisposes the jury to find him liable or guilty. [notes omitted].

Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 1:02 (1984 and 1992 Supp.). Uncharged misconduct evidence has been described as the "most prejudicial evidence imaginable against an accused". *People v. Smallwood*, 228 Cal. Rptr. 913, 722 P. 2d 197, 205 (1986).

> issue of intent. A defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred.

United States v. Adderly, 529 F. 2d 1178, 1180-81 (5th Cir. 1976). As noted by Imwenkerlied, "The ideal case for exclusion is one in which (1) the defendant has not affirmatively claimed accident and (2) the nature of the crime is such that accident would not be a plausible defense." Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 5-10 (1984).

Evidence of prior bad acts is inappropriate in cases where the mental state can be inferred from the surrounding circumstances. *United States v. Gruttadauro*, 818 F. 2d 1323, 1327-28 (7th Cir. 1987). "When the mere doing of the act demonstrates criminal intent, evidence of other misconduct offered to prove general or specific intent is immaterial." Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1222 (1986) [hereinafter cited as "The Logical Inconsistencies"].

> Roach's defense was that he did not commit the act. He does not, as well he could not, contend that he committed the act with innocent intent. [cites omitted] . . . We do not believe that intent was sufficiently at issue to allow the questioned evidence as probative of intent.

State v. Roach, 109 Idaho 973, 712 P. 2d 674, 676 (1985) (Lewd and lascivious conduct with a minor child); *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982). "It follows then, that if intent to commit the crime is inferred from the mere commission of the act, evidence of prior crimes may not be admitted under the intent exception." Summers, *Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 Tenn. L. Rev. 515, 518 (1969).[7]

---

[7] For instance, "it is difficult to imagine how a printer could accidentally or mistakenly produce counterfeit $20 bills." Wright & Graham, *Federal Practice and Procedure: Evidence*, Sec. 5247 (1978). "One would like to think that a

(Continued on following page)

The "intent" component of the relevant provisions from the Sexual Abuse Act of 1986 requiring "sexual gratification" parallels the provisions of the Model Penal Code Sec. 213.4 (A.L. I 1980). The commentary to the Model Penal Code shows that " 'the specific intent' " component of the definition of sexual contact was inserted primarily to distinguish innocent or accidental touchings from improper sexual contact . . . That is, it appears to have been included as a means of describing and distinguishing non-criminal from criminal touchings, and not as a means of imposing a greater burden of proof on the government, or as a 'backdoor' method of introducing prior bad acts evidence."[8]

3. The Statutory Element of "Intent" was not a Contested Issue. The Prior Bad Acts Were Unnecessary.

A bare plea of not guilty is insufficient to allow the admission of uncharged misconduct evidence on an uncontested issue. "The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice." *Thompson v. The King*, [1918] A.C. 221, 232-33.

> If it is unrealistic to assume that the defendant will contest the issue and the issue is only technically in dispute and not in substance, most courts exclude

---

(Continued from previous page)

court justifying admissibility under the present exception in such a case was itself a victim of mistake or accident." *Ibid.* See, *United States v. Manafzadeh*, 592 F. 2d 81, 88 (2nd Cir. 1979) (Where defendant denied participation in the charged acts, and there was no defense that the defendant committed the acts as a result of mistake or accident, evidence of other crimes was not admissible to prove intent); *State v. Jackson*, 102 Wash. 2d 689, 689 P. 2d 76, 79 (1984). Contrast the following cases where mistake or accident were directly in issue; *State v. Craig*, 219 Neb. 70, 361 N.W. 2d 206, 211 (Neb. 1985); *United States v. Harris*, 661 F. 2d 138, 142 (10th Cir. 1981); *State v. Stewart*, 219 Neb. 347, 363 N.W. 2d 368, 370 (1985).

[8] The use of prior offenses to establish specific intent is based upon the "doctrine of changes" or the doctrine of probability. *Wigmore on Evidence*, Sec. 302 (3d ed. 1980). The doctrine is used to negative accident, mistake, inadvertence or other innocent mental state, based upon the principle that similar results do not usually occur repetitively through abnormal or unintentional causes.

> the prosecution's uncharged misconduct. The issue is a mere phantom.

Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 8:10 (1984); Cowen & Carter, *Essays on the Law of Evidence*, 128-29 (1956); Wright & Graham, *Federal Practice and Procedure: Evidence*, Secs. 5242 and 5249 ("The issue of intent must be seriously disputed"); Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 Cin. L. Rev. 299, 307-08 (1982) [hereinafter referred to as *Reed II*].

> "Probative worth," however, consists of more than logical relevance or persuasiveness. No matter how persuasive of the fact it is supposed to prove, other crimes evidence has no probative worth if the fact is not in issue . . . [b]ecause such evidence does not advance the search for truth, it serves no purpose which might justify whatever prejudice it creates, and is excluded for that reason.
>
> * * *
>
> Clearly, prosecutors are aware of the usefulness such evidence has in securing convictions, and the temptations to introduce this evidence in the hope that it will have a prejudicial effect are undoubtedly great. . . . At the very least, therefore, the prosecutor should be required to offer all more direct and less volatile data before he relies on other crimes information. The "necessity" rule, if applied to all evidence at the prosecutor's command, will tend to insure this result. [footnotes omitted].

Notes and Comments, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L. J. 763, 770-73 (1961).

"On the other hand, the presence or absence of a genuine need for the questioned evidence is a legitimate part of the balancing analysis required by Federal Rule of Evidence 403. [cites omitted]." *United States v. Schwartz*, 790 F. 2d 1059, 1061 (3rd Cir. 1986). Generally, an issue of "intent" does not exist when the defendant claims that he did not do the charged act at all. See, *United States v. Powell*, 587 F. 2d 443, 448 (9th Cir. 1978) ("When a defendant denies participation in the act or acts which constitute the crime, intent is not a material

issue for the purpose of applying Rule 404(b)); *United States v. Silva*, 580 F. 2d 144, 148 (5th Cir. 1978) ("[D]efendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred."). "Sanchez points out, however, it has been held that where a defendant categorically denies any sexual involvement with the child he does not place his intent in issue." *People v. Sanchez*, 256 Cal. Rptr. 446, 464 (Cal. App. 4 Dist. 1989).[9]

---

[9] "Where the nature of the evidence and the actions of the defense make it clear that intent is not being meaningfully controverted, the other crimes evidence must be excluded." *Landrum v. United States*, 559 A. 2d 1323, 1328 (D.C. App. 1989). "Defendants who deny participation in the act do not raise the issue of intent, thereby exposing themselves to evidence of other misconduct, where the performance of the act would indisputably show criminal intent." *The Logical Inconsistencies*, 61 Wash. L. Rev. 1213, 1222 (1986); *United States v. Ortiz*, 857 F. 2d 900, 904 (2nd Cir. 1988); *United States v. Oppon*, 863 F. 2d 141, 149 (1st Cir. 1988) (J. Coffin, concurring) "If the mere existence of [intent] justified the admission of prior bad acts, the general bar against propensity evidence would be swallowed up." [cites omitted]), *United States v. Simon*, 842 F. 2d 552, 555-56 (1st Cir. 1988) (J. Torruella, concurring); *Thompson v. United States*, 546 A.2d 414, 422-23 (D.C. App. 1988).

> If the Government has a strong case on the intent issue, as here, the extrinsic offenses may add little and consequently will be excluded more readily; if the defendant's intent is not contested, the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice.

United States v. Soundingsides, 820 F. 2d 1232, 1237 (10th Cir. 1987). *State v. Harris*, 123 Wis. 2d 231, 365 N.W. 2d 922, 925 (Wis. App. 1985) (The opinion cites the Federal Advisory Committee's Note to Rule 404(b)); *Whitty v. State*, 34 Wis. 2d 278, 149 N.W. 2d 557, 565-66 (1967), *cert. denied*, 390 U.S. 959 (1968) ("Piling on such evidence as a final 'kick at the cat' when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence."); C. McCormick, *Evidence*, Sec. 190 (3rd Ed. E. Cleary 1984 and 1987 Supp.)

As Wigmore notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." It breeds a tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses . . . ". *Wigmore on Evidence*, Sec. 194; *United States v. Gubelman*, 571 F. 2d 1252, 1254 n.8 (2d Cir. 1978) ("These issues were at best only technically in dispute, since appellant's defense was that he took no bribes at all,

(Continued on following page)

"The exclusion of other crimes evidence is not simply a 'technicality' designed to prevent law enforcement personnel from doing their job; it reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence". *United States v. Daniels,* 770 F. 2d 1111, 1118 (D.C. Cir. 1985); *Landrum v. United States,* 559 A. 2d 1323, 1327 (D.C. App. 1989). "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is". *United States v. Myers,* 550 F. 2d 1036, 1044 (5th Cir. 1977). "Once evidence of prior crimes reaches the jury, 'it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence.' " *United States v. Daniels,* 770 F. 2d 1111, 1118 (D.C. Cir. 1985), quoting from *Government of the Virgin Islands v. Toto,* 529 F. 2d 278, 283 (3rd Cir. 1976).[10]

The *Hadley* decision needlessly sterilizes the balancing test of Rule 403 by simply admitting prior misconduct

---

(Continued from previous page)

not that he received money or other things of value unknowingly." [cites omitted]).

England has also adopted the "necessity" position. See *Noor Mohammed v. The King* [1949] A.C. 182, 190-96.

[10] Although several state courts recognize an exception to the prohibition against using propensity evidence to establish guilt in cases involving sexual misconduct against children, the antiquated exception did not survive the adoption of the Federal Rules of Evidence. See, Imwenkerlied, *Uncharged Misconduct Evidence,* Sec. 4:11-4:19 (1984). Also see, *Getz v. State,* 538 A.2d 726, 733 (Del.Super.1988). It is interesting to note that the government relied upon old cases decided by the State of Arizona to support its request to allow evidence of prior bad acts. See, *Government's Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts* at pp. 6-7 ("Arizona case law is instructive . . . ") (C.R. 44). Arizona had expressly allowed a special exception to the "exclusionary rule" for admitting prior misconduct evidence in sex offense cases. But since 1977, the exception only applies if expert testimony establishes the defendant's disposition toward sex offenses. *State v. Treadaway,* 116 Ariz. 163, 568 P. 2d 1061 (1977); Imwenkerlied, *Uncharged Misconduct Evidence,* Sec. 4:17 (1984). While the government relied upon the antiquated sexual propensity exception, it did not attempt to provide the expert testimony required by *Treadaway.* The government was simply mistaken about the propriety of prior misconduct evidence under the Federal Rules of Evidence.

evidence whenever the defendant is charged with a specific intent crime. Several decisions from the Seventh Circuit have also placed barricades between Rule 403 and "specific intent crimes". *United States v. Monzon,* 869 F. 2d 338, 344 (7th Cir. 1989), *cert. denied,* 109 S. Ct. 2087 (1989) ("In cases involving specific intent crimes, intent is automatically an issue regardless of whether the defendant has made intent an issue in the case."); *United States v. Mazzanti,* 888 F. 2d 1165, 1171 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 2167 (1990); *United States v. Chaimson,* 760 F. 2d 798, 806 (7th Cir. 1985). But see, *United States v. Fierson,* 419 F. 2d 1020, 1023 (7th Cir. 1969) (Issue of specific intent must be disputed to justify admission of prior bad acts). The rigid rule of the *Hadley* decision and the Seventh Circuit effectively eliminates the balancing test of Rule 403. It invites wholesale misuse of prior misconduct evidence.

> Evidence directed to a category other than propensity is not, however, admissible unless this issue is actually being controverted. This is simply a specialized application of the usual rule that evidence must be probative of a fact that is of consequence, that is to say material, to an action in order to be relevant. [cite omitted]. Although this is an elementary principle of the law of evidence, it has proven difficult to apply in a number of contexts involving other crimes evidence.

Weistein's Evidence, Sec. 404[09] (1985).

Even the Seventh Circuit, however, holds that prior misconduct evidence is not admissible if the defendant did not directly put his or her mental state in issue when the crime charged is a general intent crime rather than a specific intent crime. *United States v. Gruttadauro,* 818 F. 2d 1323, 1327-28 (7th Cir. 1987), *United States v. Hudson,* 884 F. 2d 1016, 1018-22 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 3221 (1990); *United States v. Harrod,* 856 F. 2d 996 (7th Cir. 1988); *United States v. Manganellis,* 864 F. 2d 528, 531-39 (7th Cir. 1988). The pivotal balancing test of Rule 403 should not be absolutely barred when it may be needed most. The balance of prejudice versus probative value is essential for "specific intent" crimes too!

Indeed, other Ninth Circuit cases are inconsistent with the holding of the three judge panel in *Hadley*. See, *United States v. Brown*, 880 F. 2d 1012, 1013-17 (9th Cir. 1989) (Since motive was not a disputed issue at trial, the introduction of prior bad act evidence constituted prejudicial error); *United States v. Powell*, 587 F. 2d 443, 448 (9th Cir. 1978).

4. The Prior Bad Acts Were Prematurely Allowed During the Government's Case-In-Chief. The Weighing Process of Rule 403 Was Not Utilized.

In many cases, the key to a fair trial depends upon the omission or exclusion of prior bad act evidence. Although the trial court is blessed with wide discretion, the Court is also obligated to carefully balance the incremental probative value of the proffered evidence against unfair prejudice. But, "it may be difficult to strike this balance until the defense's case is concluded, permitting the government's need for the evidence to be weighed against the ensuing prejudice to the defendant." *Weinstein's Evidence*, Sec. 404[09] (1985); *United States v. Danzey*, 594 F. 2d 905, 914 (2nd Cir. 1979), *cert. denied*, 441 U.S. 951 (1979); *United States v. Alessi*, 638 F. 2d 466, 477 (2nd Cir. 1980); *United States v. Figueroa*, 618 F. 2d 934, 939 (2nd Cir. 1980); *United States v. Robinson*, 560 F. 2d 507, 515 (2nd Cir. 1977), *cert. denied*, 435 U.S. 905 (1978). Mr. Hadley's attorney requested that Judge Carroll wait until the close of Mr. Hadley's case to determine whether "intent" or "motive" were contested issues in the case. Then, a more informed decision could be made about the probative value of the proffered evidence. Judge Carroll, however, refused to stay his hand. (R.T. Vol. III, p. 674).[11]

---

[11] The use of timing as a tool to implement the balancing process of Rule 403 has not been restricted to the Second Circuit, but has been employed by the Seventh Circuit as well:

> On the other hand, we have stated that when intent is only a formal issue, so that proof of the proscribed act gives rise to an inference of intent, then unless the government has reason to believe that the defense will raise intent as an issue, evidence of other acts directed

(Continued on following page)

5. The Prejudice was Overwhelming, While the Probative Value was Slight.

Justice Cardozo noted that uncharged misconduct evidence can be a "peril to the innocent". *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466, 468 (1930). "In our system of jurisprudence, we try cases, rather than persons." *People v. Allen*, 429 Mich. 558, 420 N.W. 2nd 499, 503-504 (1988).

But, the careless introduction of prior misconduct evidence removes vitality from the philosophical underpinnings of our accusatory, rather than inquisitorial, system of justice. "A drop of ink cannot be removed from a glass of milk." *Government of Virgin Islands v. Toto*, 529 F. 2d 278, 283 (3rd Cir. 1976); *Reed III* at 166-69.[12]

(Continued from previous page)

> toward this issue should not be used in the government's case-in-chief and should not be admitted until the defendant raises the issue . . . To allow intent automatically to become an issue in that class of cases in which intent is inferable from the nature of the act charged would create an exception that "would virtually swallow the rule against admission of evidence of prior misconduct." *United States v. Ring*, 513 F. 2d 1001, 1009 (6th Cir. 1975).

United States v. Shackleford, 738 F. 2d 776, 781 (7th Cir. 1984). Also see, *Landrum v. United States*, 559 A. 2d 1323, 1326 (D.C. App. 1989) ("[W]e have held, and reiterate today, that, absent exceptional circumstances, the government should not be permitted to introduce other crimes evidence in its case-in-chief to prove intent."); *State v. Harris*, 123 Wis. 2d 231, 365 N.W.2d 922, 926 (Wis. App. 1985); Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297, 304 n. 28 (1982).

[12] Professor Reed argues strongly that, at the least, the defendant must be given notice in advance of trial that the government intends to utilize evidence of uncharged misconduct. Otherwise, the accused is denied the right to be informed of the nature of the charges pending against him or her as guaranteed by the Sixth Amendment. Of course, we know that Mr. Hadley was not given notice of some of the most vicious prior bad acts used against him at trial. Mr. Hadley was not given any opportunity to investigate or rebut the evidence of prior bad acts introduced by the government. *Reed III* at pp. 166-69 (1984). Unfair surprise is an additional factor to apply under Rule 403. Rule 404(b) has now been amended to require the government to give advance notice of proposed evidence of prior bad acts before trial.

Unfortunately, the prejudice flowing from evidence of prior sexual misconduct against children is at its highest degree. See, e.g., *State v. Smith,* 106 Wash. 2d 772, 725 P. 2d 951, 952 (1986); *State v. Treadaway,* 116 Ariz. 163, 586 P. 2d 1061, 1065 (1977).

> [T]o bombard the [factfinder] with evidence that appellant is a child abuser in general . . . presents a classic example of the kind of evidence which hopelessly distracts the [factfinder] from the issues [it is] called upon to resolve and adulterates the deliberative process.

Clark v. State, 693 S.W. 2d 35, 38 (Tex. App. 1985).

On the other hand, the incremental probative value of the prior misconduct evidence on the marginal issue of "intent" was nearly non-existent. "Prior sexual offenses and other heinous crimes can be extremely damning, even though their logical relation to the crime charged may be tenuous." Notes and Comments, *Other Crimes Evidence At Trial: Of Balancing and Other Matters,* 70 Yale L. J. 763, 773 (1961). The use of similar extrinsic bad acts is especially dangerous "because the prejudice to the accused . . . is often much greater than the probative value of such an offense . . . ". *Reed III* at pp. 168-69. Again, the conclusion is punctuated in cases like Mr. Hadley's because "of the intensely emotional nature of prosecutions for sex crimes which heightens the possibility of juror prejudice." Snively, *Time for Change: Evidentiary Safeguards Needed in Trials for Sexual Offenses,* 11 Ind. L. Rev. 895 (1978); Kyser, *Developments in Evidence of Other Crimes,* 7 J. of Law Reform 535, 544 (1974); London School of Economics Jury Project, *Juries and the Rules of Evidence,* 1973 Crim. L. Rev. (Eng.) 208.

The balancing process of Rule 403 should be employed in an informative and meaningful manner, which takes into account the conclusions of contemporary empirical studies, rather than psychological misunderstandings of Dean Wigmore's era. Rule 403 should be utilized carefully to ensure a fair trial.

As opposed to erroneous assumptions of the "trait theory" of personality, jurors tend to draw a "complete, integrated image of []personality" from negative, fragmented information about a person (bad act evidence). "It appears certain that when the law requests jurors to give character evidence a restricted use, it demands a 'mental gymnastic which is beyond, not only the jury's power, but anybody else's.' " Lawson, *Credibility and Character: A Different Look at an Interminable Problem,* 50 Notre Dame Lawyer 758, 774 (1975), [hereinafter referred to as "Credibility and Character"], quoting from *Nash v. United States,* 54 F. 2d 1006, 1007 (2nd Cir. 1932). "This reaction is known as the 'halo effect' – 'one outstanding 'good' or 'bad' quality in a person casts its reflection upon all judgments pertaining to him.' " *Ibid.* at p. 778 [footnote and cites omitted]. The "misinterpretation mechanism" tends to severely overestimate the weight of prior bad acts evidence [*Ibid.* at pp. 778-786.], prompting one writer to rename the misinterpretative mechanism as the "devil's horns effect". Mendez, *Character Evidence,* at p. 1047 (See, *supra,* n.4). Also see, Imwenkerlied, *Uncharged Misconduct Evidence,* Sec. 1:02-1:03 (1984 and 1992 Supp.) (numerous studies and articles cited); Note 4, *supra.*

The real goal of Rule 403 is "securing truth through procedural fairness", which means "rendition of verdicts by an unbiased jury based upon the logical implications of the evidence. Rule 403 can advance truth and fairness by excluding evidence that tends to induce the jury to think illogically or employ an improper basis." Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence,* 18 Univ. of Calif., Davis 59, 67-69 (1984). "Evidence has probative value if it enhances the accuracy of jury factfinding . . . On the other hand, evidence is unfairly prejudicial when it detracts from the accuracy of factfinding by inducing the jury to commit an inferential error. Inferential errors occur when the jury perceives evidence to be logically probative of a fact when it is not, perceives the evidence to be more probative of fact than it logically is, or bases its decision on improper basis." *Ibid.* at p. 73.

As emphasized by the Advisory Committee's Notes to Rule 403, probative value must be viewed as the "product of the logical potential of evidence in the evidentiary and cognitive context within which it is offered." In turn, unfair prejudice "must refer, in part, to the tendency of evidence to lead the jury to commit an inferential error", including improper bias, illogical inferences, overvalued inferences, undue confusion or emotion. Gold, *supra,* at pp. 76-83.

In order to apply Rule 403, judges must consider and predict jury reaction to evidence. Recent empirical research must be evaluated. "For example, if the jury is equally likely to draw proper or improper inferences, the extent of the resulting benefit or distortion can become critical. If the distorting effect of the improper inference is great while the beneficial effects of the proper inference are small, such evidence should be excluded." Gold, *supra,* at p. 89.

If we apply the careful balancing approach suggested by Professor Gold, in light of the contextual variables of the trial and the marginal issue of "intent" at stake, exclusion of the prior bad acts evidence is clearly warranted. Empirical "research casts serious doubts on the assumed probative value of character evidence and appears to confirm the law's concern that such evidence carries undeserved weight." Mendez, *Character Evidence,* at p. 1059; Lawson, *Credibility and Character,* at p. 786 ("[T]he data most certainly reveal that the probative worth of character evidence is very low.") "[W]here intent is a necessary conclusion from the act, and the act charged is not equivocal, proof of other offenses to cast light upon intent, even though similar in nature, should not be permitted under any circumstances." Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma,* 20 Kan L. Rev. 411, 418 (1972).

Other crimes evidence should not be admitted "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *United States v. Kahaner,* 317 F. 2d 459, 471-72 (2nd Cir. 1963), *cert. denied,* 375 U.S. 836 (1963). The prior bad acts did not establish the guilt of Mr. Hadley on

the offenses charged, but painted him as an undetected and unpunished child molester.[13]

---

[13] Several, additional factors added to the prejudice and negated the probative value of the evidence delivered by the prior acts. (1) The extreme, explicit acts involving Kyle Hartman were quite remote (ranging up to 17 years). (2) The government misused the evidence during closing argument to show propensity. (3) The government improperly baited Mr. Hadley by asking him questions on cross-examination relating to numerous, alleged bad acts, his supposed character profile, and adverse reputation. (4) Finally, the trial court refused to grant a continuance to Mr. Hadley so that he could contend with the unfair surprise created by Mr. Hartman's testimony.

The Government's cross-examination of Mr. Hadley to establish or insinuate the existence of other bad acts was clearly beyond the scope of direct examination in violation of Rule 611(b), Federal Rules of Evidence. Moreover, inquiry into specific instances of misconduct on cross-examination requires that the acts must be clearly probative of truthfulness or untruthfulness. *Crimm v. Missouri Pacific R. Co.,* 750 F. 2d 703, 707 (8th Cir. 1984); *United States v. Rubin,* 733 F. 2d 837, 841-42 (11th Cir. 1984); *United States v. Mansaw,* 714 F. 2d 785, 789 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 403 (1983); *United States v. Reed,* 700 F. 2d 638 (11th Cir. 1983); *United States v. Rabinowitz,* 578 F. 2d 910 (2nd Cir. 1978); *United States v. Young,* 567 F. 2d 799, 803 (8th Cir. 1977), *cert. denied,* 434 U.S. 1079 (1978).

> Since Rule 608(b) is intended to be restrictive – and was amended to ensure that it would be restrictively interpreted by trial courts – the inquiry on cross-examination should be limited to these specific modes of conduct which are generally agreed to indicate a lack of truthfulness.

J. Weinstein and M. Berger, *Weinstein's Evidence,* Vol. 3, Section 608[05], at 608-33 (1985 and 1988 Supp.). Of course, the possibility of prejudice is greatest when the witness is the accused.

> It is appropriate to limit attacks on the defendant while permitting freer inquiry against other witnesses. There is substantial danger that the jury will believe that the defendant is a bad man deserving of punishment even if he did not do the particular act charged.

Weinstein's Evidence, at pp. 608-35, (1985 and 1988 Supp.). Also see, *United States v. Kennedy,* 714 F. 2d 968, 973 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1305 (1984); *United States v. Page,* 808 F. 2d 723, 730 (10th Cir. 1987), *cert. denied,* 42 U.S. 918 (1987). Judge Carroll's conclusion that broader cross-examination is allowed against criminal defendants and in cases arising from Indian reservations where people are "unsophisticated" is simply not supported by applicable law.

(Continued on following page)

6. The Use of a Limiting Instruction Did Not Eliminate the Prejudice.

Although the trial court did little to employ the balancing process required by Rule 403, the trial court did give a limiting instruction. Unfortunately, the limiting instruction simply could not pretend to return a fair trial to Mr. Hadley. In light of the nature and depth of prior misconduct evidence presented against Mr. Hadley, it is silly to believe that the prejudice could be tamed through the use of a limiting instruction. "The virus of the ruling is not so easily extracted." *People v. Zackowitz*, 172 N.E. 466, 468 (1930).

> The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.

Krulewitch v. United States, 336 U.S. 440, 453 (1949) (J. Jackson, concurring). "It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again . . . As a practical matter, prosecutors are aware of the utility of such evidence in securing convictions, and the temptations to introduce such evidence in hope of achieving the prohibited prejudicial effect are undoubtedly great. Ladd, *Credibility Test – Current Trends*, 89 U. Pa. L.

(Continued from previous page)

The evidence relating to Kyle Hartman was too remote in time to reliably establish "intent" on the part of Mr. Hadley. The probative value of the evidence is substantially weakened because of remoteness in time, especially when the evidence is proffered for the purpose of showing "intent". *United States v. Brown*, 873 F. 2d 1265, 1268 n.2 (9th Cir. 1989); *United States v. Fields*, 871 F. 2d 188, 198 (1st Cir. 1989); *United States v. Rubior-Gonzales*, 674 F. 2d 1067, 1075 (5th Cir. 1982).

The trial court unfairly refused to grant a continuance to afford defense counsel an opportunity to investigate Mr. Hartman's damaging accusations. The failure to grant a continuance denied Mr. Hadley of due process of law and a meaningful opportunity to confront and cross-examine Mr. Hartman.

Rev. 166, 190 (1941)." *State v. Newton*, 109 Wash. 2d 69, 743 P. 2d 254, 256-57 (1987).[14]

"[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is too great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). The use of prior, explicit sexual offenses against Mr. Hadley is one of the contexts recognized by this Court.[15]

---

[14] The government aggravated the prejudicial nature of prior bad acts by suggesting propensity during closing argument. (R.T., Vol. 9, pp. 1729, 1796-98). The misuse of the evidence denied Mr. Hadley of a fair trial. See, e.g., *Hall v. United States*, 150 U.S. 1003, 1006-07 (1893).

The experience of judicial review and the empirical data from academic studies reveal that limiting instructions do not overcome the prejudicial effect of prior misconduct evidence. "Prior sexual offenses and other heinous crimes can be particularly damming although their logical relation to the crime charged may be tenuous or non-existent." *State v. Newton*, 109 Wash. 2d 69, 743 P. 2d 254, 256, 259 (1987). The unfounded expectations fastened on to limiting instructions requires "a feat of psychological wizardry verg[ing] on the impossible . . . " *United States v. Banmiller*, 310 F. 2d 720, 725 (3rd Cir. 1962); *United States v. Gillespie*, 852 F. 2d 475, 479 (9th Cir. 1988) ("The government's argument that admission of the evidence of homosexuality was harmless because the trial court gave a limiting instruction is unconvincing . . . Under these circumstances the trial court's curative instruction to the jury was not sufficient to obviate the prejudice."); *Government of Virgin Islands v. Toto*, 529 F. 2d 278, 283 (3rd Cir. 1976) (Improper admission of prior conviction was not cured by trial judge's instruction).

> There is reason to doubt the efficacy of any jury instructions, regardless of the care with which it is drafted. Once such evidence is before the jury the damaging prejudicial effect cannot be wiped out by subsequent limitation.

Shotwell, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight"*, 21 U.C.L.A. L. Rev. 892, 913 (1974).

[15] See, e.g., Notes and Comments, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L. J. 763, 778 (1961) ("Perhaps the most illogical protective device is the jury instruction to use the evidence only in weighing credibility. Observers conclude the order is not obeyed, and a moment's reflection about thought processes raise doubts as to whether it can be obeyed. Yet

(Continued on following page)

B. THE OFFER TO CONCEDE OR STIPULATE TO THE ISSUE OF INTENT SHOULD BE A RELEVANT FACTOR TO CONSIDER UNDER RULE 403. THE NINTH CIRCUIT EMASCULATED THE BALANCING APPROACH OF RULE 403 BY REFUSING TO EVEN CONSIDER THE PROPOSED STIPULATION OR JUDICIAL ADMISSION.

The opinion of the Court of Appeals for the Ninth Circuit merely states that Mr. Hadley "offered not to argue the issue of intent" (918 F. 2d 848, 851), but Mr. Hadley did more than promise to forego argument on the issue of intent. He unequivocally offered to stipulate that the requisite intent existed. He conceded the issue of "intent" approximately five months before trial. Yet the undisputed issue of "intent" was used as a pretext for admitting massive amounts of prior uncharged misconduct evidence for the purpose of bludgeoning Mr. Hadley into conviction.

The utility of a judicial admission or stipulation is not a novel discovery. They are used broadly in civil litigation and have been used extensively in criminal cases as well.[16] See, *Marshall v. Lunberger*, 459 U.S. 447 (1983) (J. Blackmun, dissenting).

(Continued from previous page)

use of the instruction continues, smoothing over the real question of whether uncontrolled use of such evidence ought to be allowed."); *United States v. Jacangelo*, 281 F. 2d 574, 576 (3rd Cir. 1960) ("[A] ritualistic counsel of psychologically impossible behavior."); Curtin, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant – Witness*, 45 Albany L. Rev. 1099, 1110 (1981); Eichorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 Law and Contemp. Prob. 341 (1989); Tanford, Penrod, and Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behav. 319 (1985); Green and Loftus, *When Crimes are Joined at Trial*, 9 Law and Human Behav. 193 (1985); Wissler and Saks, *On the Inefficacy of Limiting Instructions*, 9 Law and Human Behav. 37 (1985); H. Kalven & H. Zeisel, *American Jury* 127-30 (1971); Griswold, *The Long View*, 51 A.B.A. Journal 1017, 1021 (1965).

[16] Where the prosecutor proposes to introduce such evidence to prove the required intent, the defendant may, under the authority of certain cases to be discussed, resort to a judicial admission, stipulating that if the act was done, it was done with the requisite criminal intent (or guilty knowledge). Once this admission has been made,

(Continued on following page)

The Second Circuit has taken the lead position in breathing true life into the balancing process of Rule 403 by taking pragmatic steps to insure that the government is afforded the opportunity to prove its case with valid and reliable evidence, while simultaneously protecting the accused citizen's right to a fair trial. In order to balance the interests of both parties, the defendant's proffered stipulation must be considered as an important factor under Rule 403 of the Federal Rules of Evidence. Serious consideration must be given to an offer to stipulate under Rule 403 of the Federal Rules of Evidence since it plays the key role in balancing the "inclusionary" provisions of Rule 404(b).

The *Hadley* decision steadfastly refuses to consider the propriety of a stipulation or judicial admission. The rigid position of the Ninth Circuit in *Hadley* simply does not

---

(Continued from previous page)

proof of the similar acts is unnecessary and therefore prejudicial. And, of course, the only remaining logical connection between similar acts and commission of the act charged is the tendency of the former to show a propensity to crime – a forbidden inference unless the defendant first introduces evidence of his good character. Thus, an admission that if the act was done it was done with the necessary *mens rea* should, logically and fairly, prevent all proof of the similar acts.

• • •

The automatic denial of the right to preclude the introduction of evidence by means of stipulation is the result of a judicial formalism attuned to times and places other than our own. A court which rigidly adheres to such an attitude must soon realize that in so doing it is often allowing the indirect evasion of rules of evidence which, no doubt, it enforces just as rigidly on other occasions. (notes omitted).

Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 J. Crim. Law, Crimin, and Pol. Sci. 15, 19 and 25-26 (1962).

Allowing stipulations in civil litigation, but refusing to allow them in criminal cases, creates a "classification" triggering the equal protection clause. The differential treatment accorded to criminal defendants by the unfair classification runs afoul of the equal protection guarantee and is, therefore, unconstitutional. See Imwenkerlied, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 Emory L. J. 341 (1991). Of course, Rule 403 should be construed and applied to avoid constitutional problems.

comport with the flexible, balancing process of Rule 403 of the Federal Rules of Evidence. Curiously, the Ninth Circuit has previously required the government to accept appropriate stipulations in criminal cases. *United States v. Shapiro*, 879 F. 2d 468, 470 (9th Cir. 1989); *United States v. Durcan*, 539 F. 2d 29, 30-31 (9th Cir. 1976) ("majority view").

The offer to concede "intent" by Mr. Hadley should have been seriously considered by the trial court as part of its duty to balance the probative value of questioned evidence against its prejudicial effect. See Rule 403, Federal Rules of Evidence. As displayed by the preceding section of this brief, the prior bad acts were not necessary or helpful to an accurate assessment of the guilt or innocence of Mr. Hadley. Since "the intent element appears in the statute simply to negate an assertion of innocent or accidental touching", then the trial court should allow the "defendant to eliminate intent as an issue." Hutton, *Commentary: Prior Sexual Contact With a Child*, 34 S.D.L. Rev. 604, 611, 623-24 (1989).

Of course, the Advisory Committee Notes to Rule 404(b) expressly require that the trial court consider less prejudicial alternatives than prior bad act evidence. At the least, "Rule 403 would appear to make it proper for the court to consider the defendant's offer to stipulate as one element in the balancing required in exercising its discretion to exclude relevant evidence." Wright & Graham, *Federal Practice and Procedure* Sec. 5194 (1978).

We submit that no rigid rule dictating the absolute refusal or acceptance of a defense offer to enter into a stipulation removing an element of the crime should exist. Instead, a careful review of the proposed stipulation should occur within the context of all the evidence in the case with careful attention focused upon the incremental, probative value of the proferred evidence, its prejudicial effect, and the availability of other means of proof.

The positions taken by the *Hadley* decision and the Seventh Circuit reflect the extreme position regarding the use of prior bad acts to establish "specific intent" crimes. We believe that this Court should adopt a sensible, middle ground.

Both the Seventh Circuit and the *Hadley* decision tend to cling to the notion that evidence of prior misconduct is relevant whenever the government must prove a specific intent crime. Both the *Hadley* decision and the Seventh Circuit fail to analyze the complexities of each case and refuse to give true meaning to the balancing test of Rule 403. See, *United States v. Chamison*, 760 F. 2d 798, 805 (7th Cir. 1985). The *Hadley* decision closes its eyes to Rule 403 as well.

To be sure, we do not assert that the accused citizen can remove the issue of "intent" by stipulation in every case. Of course, the government would not be required to accept the stipulation if it impaired the effectiveness of the prosecution's legitimate case. *People v. Villa*, 178 Cal. Rptr. 398, 125 Cal. App. 3d 872 (1981) (The defendant could not preclude the government from admitting evidence of injuries suffered by a rape victim by simply offering to stipulate that the victim suffered great bodily harm.); *United States v. Sampol*, 636 F. 2d 621, 679 (D.C. Cir. 1980) (The government was entitled to use autopsy evidence to show the force of a bomb used in a political assassination in order to establish intent to kill despite the offer of defendants to stipulate that the deaths were caused by bombing. To be sure, the meager stipulation offered by the defendants diluted the force of the proposed evidence.). Each case must be considered on its own merits.

> The effect of adopting this opposite extreme in construing the Rule would be to require a party to accept any stipulation offered by his opponent and thus would allow a party to control the proof presented by his opponent at trial . . . A cold stipulation can deprive a party "of the legitimate moral force of his evidence," . . . and never can fully substitute for tangible, physical evidence or the testimony of witnesses.

United States v. Grassi, 602 F. 2d 1192, 1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980); *United States v. Doherty*, 675 F. Supp. 714, 716-18 (D. Mass. 1987); *United States v. Manner*, 887 F. 2d 317, 321-22 (D.C. Cir. 1989). But, we believe that cases which reject the position of the Second Circuit on a wholesale basis not only unfairly analyze the cases decided, but miss the crux of Rule 403. The questioned

evidence in Mr. Hadley's case consisted completely of extrinsic, uncharged misconduct. The proposed stipulation would not have impaired the effectiveness of the government's case. It would have only eliminated the red herring.

Indeed, the Second Circuit has not adopted an inflexible rule allowing the defendant to remove the issue of "intent" by stipulation in every case.

> Nevertheless, in some circumstances, the nature of a defense put forth by the defendant may reveal that "knowledge and intent, while technically at issue, are not really in dispute." In some cases, the defendant may specifically offer to stipulate to an issue and thereby remove it from the case. [cites omitted].

United States v. Colon, 880 F. 2d 650, 656-57 (2nd Cir. 1989).[17] Indeed, the Second Circuit has expressly refused to allow a "bare stipulation" by the defense when the stipulation might "rob the evidence of much of its fair and legitimate weight." *United States v. Pedroza*, 750 F. 2d 187, 201 (2nd Cir. 1984), *cert. denied*, 107 S. Ct. 151 (1986). Also see, *United States v. Figueroa*, 618 F. 2d 934, 941-42 (2nd Cir. 1980); *United States v. Manafzadeh*, 592 F. 2d 81, 87 (2nd Cir. 1979); *United States v. O'Connor*, 580 F. 2d 38, 41 (2nd Cir. 1978); *United States v. Williams*, 577 F. 2d 188 (2nd Cir. 1978), *cert. denied*, 439 U.S. 868 (1978).

Although the position of the Second Circuit has not been universally accepted, the *Hadley* position stands in less company. For instance, although the Court of Appeals for the Fifth Circuit in *Grassi* ostensibly rejected the position of the Second Circuit; it more clearly rejected the sterile position of the Ninth Circuit in *Hadley*. *Grassi* expressly held that the trial court "has the power to require the government to accept

---

[17] The Second Circuit requires that the stipulation "express a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements establish beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed. *United States v. Ortiz*, 857 F. 2d 900, 903-04 (2nd Cir. 1988), *cert. denied*, 109 S. Ct. 1352 (1989).

a tendered stipulation in whole or in part as well as to permit it to reject the offer to stipulate in its entirety." 602 F. 2d 1192, 1197 (5th Cir. 1979). The trial court should determine the weight to be given to an offer to stipulate in the balancing process employed by Rule 403. *Ibid.*

> The Advisory Committee's Notes on the Proposed Federal Rules of Evidence imply that the Rule 403 weighing process can, in some situations, result in requiring a party to accept his opponent's stipulations. The Note concerning Rule 401 states that evidence can be relevant even if offered on undisputed matters, but proceeds to conclude that "*[w]hile situations will arise which call for the exclusion of evidence offered to prove a point conceded to an opponent*, the ruling should be made on the basis of such considerations as waste of time and undue prejudice . . . ". [original emphasis].

Grassi at 1196-97 n.4 (5th Cir. 1979). *Grassi* has identified the appropriate balancing test to be employed under Rule 403 of the Federal Rules of Evidence. A rigid rule universally accepting or refusing proffered stipulations must be rejected. By refusing to consider Mr. Hadley's stipulation or concession relating to the marginal issue of specific intent, the Court of Appeals for the Ninth Circuit effectively precluded a meaningful balancing process under Rule 403.

The majority of federal decisions correctly conclude, contrary to the Ninth Circuit, that concessions or stipulations must be considered in each case as part of the balancing process of Rule 403.

> Unlike other courts, our circuit has declined to adopt a per se rule either for or against admission of evidence when the defendant offers to stipulate to an element of the offense.
>
> * * *
>
> As a general rule, a party may not preclude his adversary's offer of proof by admission or stipulation. This proposition, however, is qualified by Rule 403 of the Federal Rules of Evidence, which requires that evidence be excluded if its potential for unfair prejudice is substantially outweighed by

> its probative value. The ultimate decision to exclude evidence under Rule 403 is "committed to the sound discretion of the trial court, tempered by the particular facts presented." [citing *Grassi*] . . . An offer to stipulate is one factor that the trial court should consider in making a determination under Rule 403 [cites omitted].

United States v. O'Shea, 724 F. 2d 1514, 1516 (11th Cir. 1984).[18]

We advocate the utilization of the middle ground position taken by most federal courts that have considered the issue carefully over the course of the last few years.

> An offer to stipulate nevertheless remains a salient factor in the weighing process contemplated under Rule 403, as the applicable authorities counsel that the trial court may properly consider the tendered admission "as one element in the balancing required in exercising its discretion". [cites omitted].

City of Cleveland v. Cleveland Elec., etc., 538 F. Supp. 1257, 1265 (N.D. Ohio, 1980). Also see, *United States v. Provenzano*, 620 F. 2d 985, 1003-04 (3rd Cir. 1980); *State v. Berkelman*, 355 N.W. 2d 394, 396-97 (Minn. 1984) (Balancing required); *State v. Maurer*, 150 Ohio St. 3d 239, 473 N.E. 2d 768, 792 (1984) (A proposed stipulation requires a balancing analysis by the trial judge under Rule 403). Although it would be inappropriate to require the government to accept any stipulation proposed by the defendant in every criminal case, the purpose of Rule 403 would fail if proposed stipulations or concessions were not carefully considered and accepted in appropriate cases.

> [T]he party offering the evidence is deprived of an important tactical advantage. Indeed, where the evidence is not relevant to any real issue, the advantage sought to be gained by its presentation must be recognized as unfair. **Each side takes the risk that the "picture" of the case seen by the jury may be an unfavorable decisional context. But neither side is entitled to litigate a non-existent issue for no purpose other than to alter the decisional context in his favor.** [emphasis added].

Albrecht v. Broughton, 85 Cal. Rptr. 659, 662 (Cal. App. 1 Dist. 1970). Indeed, a proposed stipulation, balanced within the parameters of Rule 403, can serve both parties well by providing a fair trial.

Indeed, earlier cases from the Seventh Circuit also recognized the need to consider stipulations under the balancing test of Rule 403.

> The government is not bound to stipulate to such facts unless the prejudicial aspects of the testimony in context outweigh its probative value, although the feasibility of a stipulation and the prosecution's need for the testimony generally should be taken into account by the trial judge in the weighing process. [cites omitted].

United States v. DeJohn, 638 F. 2d 1048, 1053 (7th Cir. 1981).

Obviously, the defendant's decision to stipulate to the issue of "intent" undermines it as a serious issue in the case. See, C. McCormick, *Law of Evidence*, Sec. 190, at 452 n.54 (1987); *United States v. Buckhanon*, 505 F. 2d 1079, 1083 n.1 (8th Cir. 1974). The "presence of a stipulation would have gone far toward" rendering evidence of prior convictions

---

[18] As part of the Rule 403 balancing process, the trial court should determine whether or not "intent" was a genuine or contested issue at trial, whether the defendant took affirmative steps to remove the issue of intent from the case by clearly conceding or stipulating to the issue, the relative strength of the government's case on the issue of intent absent the prior bad acts, and whether the government actually needed prior misconduct evidence to establish intent. *United States v. Cardenas*, 895 F. 2d 1338, 1342-45 (11th Cir. 1990).

To be sure, we believe that the Second Circuit, since its leading decision in *United States v. Mohel*, 604 F. 2d 748 (2nd Cir. 1979), has expanded or elaborated on its position to fit within those cases that require a particularized balancing process under Rule 403 in every case. Compare, *United States v. Colon*, 880 F. 2d 650, 656-60 (2nd Cir. 1989).

One commentator has suggested detailed guidelines that a trial court should follow in deciding whether to admit prior bad acts evidence on the question of intent under Rule 404(b). See, Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1236 (1986); Also see, Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 617 n.63 (1989).

"unnecessary, unfair, and prejudicial . . . ". *United States v. Timpani*, 665 F. 2d 1, 6 (1st Cir. 1981). The "better reasoned cases" conclude that evidence tending to establish a fact not in dispute is necessarily less relevant than disputed evidence. *People v. Municipal Court, etc.*, 158 Cal. Rptr. 739 (Cal. App. 2 Dist. 1979).

The thoughtful use of judicial admissions or stipulations should not be barred from criminal litigation as dictated by the *Hadley* decision merely because a marginal issue of "specific intent" exists somewhere in the case. Instead, admissions or stipulations may be quite useful in appropriate cases in order to help the trial court balance unfair prejudice against the incremental, probative value of disputed evidence. Mr. Hadley could have received a fair trial if his concessions and offers to stipulate on the issue of "intent" were sincerely considered. A fair balance under Rule 403 would not have adversely affected the ability of the government to establish its case against Mr. Hadley with legitimate evidence. Judicial integrity, intellectual honesty, and a fair trial should all flourish together. Principled guidelines should apply to Rule 403.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed. The judgment, sentence, and conviction of the district court should be set aside and a new trial ordered.

Respectfully submitted,

JOHN TREBON
Security Pacific Bank Building
121 E. Birch Avenue, Suite 207
Flagstaff, Arizona 86001
(602) 779-1713
Counsel for Petitioner

APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise famous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n.15 (Fryer ed. 1957). The rule summarizes this relationship as "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 162, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, " * * * [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations a waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed

to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The provision that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar

provisions see California Evidence Code §§ 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60-4-7(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and

now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. § 1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. § 3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. § 8693, same as to Air Force; 11 U.S.C. § 25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. § 205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. § 403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. § 9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. § 605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy – A Conflict in Theory, 5 Van.L.Rev. 385, 392 (1952); McCormick § 152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this report following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p.

320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal Law Revision Comm'n Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. [Effective until Dec. 1, 1991. See, also, subd. (b) below.] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) Other crimes, wrongs, or acts. [Effective on Dec. 1, 1991. See, also, subd. (b) above.] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the

general nature of any such evidence it intends to introduce at trial. (As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting in inference that the person acted on the occasion in question consistently with his character. This use of character is often described

as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character, (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers, L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in

accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id.*, 615:

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

1991 AMENDMENT

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, *see, e.g., United States v. McClure*, 546 F.2nd 670 (5th Cir.1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. *See, e.g.*, Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a

reasonable request or disclosure will depend largely on the circumstances of each case. *Compare* Fla.Stat.Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) *with* Tex.R.Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. *Cf.* Fla.Stat.Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine*, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, *see United States v. Williams*, 900 F.2d 823 (5th Cir.1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. *See United States v. Huddleston*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on

occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not

generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

1987 AMENDMENT

The amendment is technical. No substantive change is intended.

TITLE 18
CRIMES AND CRIMINAL PROCEDURE

CHAPTER 109A - SEXUAL ABUSE

Sec.
2241. Aggravated sexual abuse.
2242. Sexual abuse.
2243. Sexual abuse of a minor or ward.
2244. Abusive sexual contact.
2245. Definitions for chapter.

§ 2241. Aggravated sexual abuse

(a) By force or threat. - Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act -

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnaping;

are attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means. - Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly -

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or

permission of that person, a drug, intoxicant, or other similar substance and thereby –

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(d) State of mind proof requirement. – In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Pub.L. 99-646, § 87(b), Nov. 19, 1986, 100 Stat. 3620.)

EDITORIAL NOTES

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3660.

Effective Date. Pub.L. 99-646, § 87(c), Nov. 10, 1986, provided that:

"This section and the amendments made by this section [enacting this chapter, amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w-3(a)(1)(G), 300w-4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation, and repealing chapter 99 (sections 2031 and 2032) of this title shall take effect 30 days after the date of the enactment of this Act [Nov. 10, 1986]."

[Effective Date provision similar to Pub.L 99-646, § 87(c), was enacted by Pub.L. 99-654, § 4, Nov. 14, 1986, 100 Stat. 3664, which was effective 30 days after date of enactment of Pub.L. 99-654, Nov. 14, 1986.]

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly –

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is –

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3621.)

Editorial Notes

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date. Section effective 30 days after Nov. 10, 1986, see section 87(c) of Pub.L. 99-646, set out as a note under section 2241 of this title. See, also, Pub.L. 99-654, § 4, for effective date of 30 days after Nov. 14, 1986.

§ 2243. Sexual abuse of a minor or ward

(a) Of a minor. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who –

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than five years, or both.

(b) Of a ward. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is –

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses. – (1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement. – In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew –

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3621.)

Editorial Notes

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date. Section effective 30 days after Nov. 10, 1986, see section 87(c) of Pub.L. 99-646, set out as a note under Section 2241 of this title. See, also Pub.L. 99-654, § 4, for effective date of 30 days after Nov. 14, 1986.

§ 2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate –

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than five years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than one year, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined not more than $5,000, imprisoned not more than six months, or both.

(b) In other circumstances. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined not more than $5,000, imprisoned not more than six months, or both.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3622.)

Editorial Notes

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date. Section effective 30 days after No. 10, 1986, see section 87(c) of Pub.L., 99-646, set out as a note under section 2241 of this title. See, also Pub. L. 99-654, § 4, for effective date of 30 days after No. 14, 1986.

§ 2245. Definitions for chapter

As used in this chapter –

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means –

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) the penetration, however slight, of the anal or genital opening of another by a hand or

finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; and

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means –

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of

this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3622.)